16-583

OFFICE SUPREME COURT U.S.
FILED
JAN 11 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 908.

TONEY PACE, Plaintiff in Error,

vs.

THE STATE OF ALABAMA.

BRIEF AND ARGUMENT FOR APPELLEE,

By **HENRY C. TOMPKINS,**
Attorney-General of Alabama.

Thomas McGill & Co., Law Printers, Washington, D. C.

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THE STATE OF ALABAMA.
No. 908.

Brief and Argument for Appellee, by HENRY C. TOMPKINS, *Attorney-General of Alabama.*

BRIEF OF FACTS.

The indictment in this case was found in the Circuit Court of Clarke county, Alabama, and contained two counts. The first count charged that Toney Pace, a negro, and Mary Ann Cox, a white woman, did live together in a state of adultery or fornication. The second count charged the same offense, except that it did not aver the race of the defendants. On the trial of the case a *nolle prosequi* was entered as to the second count, and the defendants were found guilty upon the first, and each sentenced to two years' imprisonment in the penitentiary. The case was carried to the Supreme Court of the State by appeal, and there the judgment of the court below was affirmed, and from that court it is brought here by writ of error.

ARGUMENT.

The record in this case presents but one question for the consideration of this court: Does the statute under which the appellant was indicted and convicted contravene any provision of the Constitution of the United States? Is the passage of such an act prohibited by any provision of the organic law of the Federal Government? The question is one of very great importance, and deserves the calm and dispassionate consideration of those who argue as well as the judges who are finally to determine it. It is of importance, because similar statutes exist in a large majority of the States; and further, because, as has been frequently declared by the courts of this country, Federal and State, an act of the department of government in which our system has lodged the law-making power should never be declared by another department of the same government void, except in the clearest and most undoubted cases. This rule applies with more force when the effort is to have the judiciary of a government—supreme it is, it is true, in the powers delegated to it—declare void the act of the legislature of a State which is also supreme in the exercise of those powers not delegated to the other sovereign, nor denied to the State. Here the question is not whether the power exercised by the State legislature is one of those which have been delegated to the Federal Government, but is it one which has been denied to the State.

The act in question is found in section 4189 of the Code of Alabama of 1876, having been brought forward into that Code from the one of 1867, and is as follows:

> "If any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years."

An analysis of the act shows that its purpose is twofold: *First*, to prevent the intermarriage of persons of the two races; and *second*, to prevent illicit sexual intercourse between them, the end to be accomplished by each prohibition being the same—the prevention of the amalgamation of the two different races.

It is admitted in the argument of appellant's counsel that the statute, so far as it prohibits the intermarriage of the two races, is a wise and valid law; but he undertakes to show that as this law imposes a greater punishment upon the act of illicit intercourse when the guilty parties are of different races, than does the general law of the State denouncing that crime, therefore it is a discrimination against the negro race, which is prohibited by the Constitution of the United States. The fallacy of his argument is twofold. In the first place, there is no discrimination against any race; the act denounced is the illicit intercourse between a person of the white and one of the negro race. This is no denial of any privilege belonging to any citizen of the United States, as no such privilege ever did or ever will exist. It is not a discrimination against the negro race, because it imposes the same punishment upon the white person that it does upon the negro who violates its provisions. The second fallacy of the argument is this: the general law denouncing the crime of adultery to which he refers, and which makes it a misdemeanor only—all crimes punishable by imprisonment in the penitentiary being, under the Alabama laws, felonies—refers and relates only to the crime of adultery when committed by parties between whom marriage is not forbidden. Our laws, as the laws of all civilized States have and do always, impose a greater punishment upon the crime of adultery, when committed between persons who are forbidden to intermarry, than upon the crime when committed by those to whom no such prohibition applies. Sec. 4187 of our code, which has been upon our statute books for more than half a century, provides that when persons within the degree of consanguinity or relationship within which marriages are declared incestuous and void, shall live together in adultery or fornication, they shall be punished by imprisonment in the penitentiary for a maximum of seven years. Thus it will be seen that the punishment imposed for the same act—that is, the living together in adultery of those who are forbidden by law to intermarry—is the same, the grade of the crime is the same, and there is no discrimination. The question, then, may be divided into three heads, for argument—

First. What is the extent of the power of the State in the regulation of marriage among its citizens?

Second. To what extent may the law-making power go, in the punishment of adultery between those who are forbidden to intermarry?

Third. Is there anything in the Constitution of the United States which limits the exercise of these powers by the legislative department of the States of this Union.

First. Upon the first point I respectfully submit that the true rule is, that the power of the law-making department of any government to say who may and who may not intermarry is absolute and untrammeled, unless limited by some provision of the organic law in States having written constitutions, and is left solely to the legislative discretion.

Marriage is not a mere contract, if it is in the ordinary sense of the term a contract at all; it is an institution. The regulation of it is the exercise of that police power which belongs to all governments. As said by Lord Cranworth in Brook *v.* Brook, 9 H. L. R., 193, "there can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marriage."

See also—

Schouler's Domestic Relations, section 13.
Bishop's Mar. and Div., 5th ed., section 18.

So it has been held not to be a contract in the sense in which that term is used in the Federal Constitution.

Maguire *v.* Maguire, 7 Dana.
Rugh *v.* Ottenheimer, 6 Oregon, 231.
Adams *v.* Palmer, 51 Maine, 480.

And the right of the State to prohibit it between persons of different races, or even different religions, has been exercised and sustained.

Bailey *v.* Bailey, 34 Me., 77.
State *v.* Hooper, 5 Iredell, 201.
Philadelphia *v.* Williamson, 10 Phil., 176.

In conclusion, upon this point, I cannot do better than to quote the language of Parsons, C. J., in Milford *v.* Worcester, 7 Mass., 48: "Marriage being essential to the peace and harmony and to the virtues and improvements of civil society, it has been in all well-regulated governments among the first attentions of the civil magistrate to regulate marriages; by defining the characters and relations of the parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families, by describing the solemnities by which the contract shall be executed." "A marriage contracted by parties *authorized by law to contract, and solemnized* in the manner prescribed by law, is a lawful marriage; *and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage.*"

See also—

Holmes *v.* Holmes, 1 Abbott, U. S., 525.
Bishop's Mar. and Div., 5th ed., section 12.

Second. The objects of the law forbidding marriages between persons within certain degrees of consanguinity and between persons of different races being one and the same, the prevention of the evil results which are supposed to be developed in their progeny and the result of illicit sexual intercourse being a like evil, the laws of all governments, nearly, have made the punishment of adultery between such persons much severer than when the act is committed by persons as to the marriage of whom no such prohibition exists. And certainly it is reasonable and proper that this should be so, for there is not only the immorality of the act itself, but there is attached to it the direct violation of a positive law of the land, which may result in the defeat of the object for which such law was enacted.

Bishop's Stat. Crimes, sec. 727.
Code of Ala. 1876, sec. 4187.
Iowa Crim. Code and Dig., secs. 4030 and 4008.
Compiled Laws Mich., secs. 7691, 7705, and 4725.
Revised Statutes of Maine, pp. 483, 487, and 848, secs. 1 and 2.
Bloom's Pop. Ed. Laws of Ohio, secs. 719-20.
Revised Statutes of New York, sec. 2511.

This citation might be continued through the statutes of the various States of the Union, perhaps; but the above is sufficient to show not only that it is within the ordinary powers of a legislature to make such a distinction in the punishment of the two acts, but it has been the policy of the law to do so.

Third. This brings me to the last point of my argument. We have seen that the power to say who may and who may not marry is one of the ordinary police powers of every government, restrained only by legislative discretion, and that the policy of the law has always been to punish acts of criminal intimacy between those who are forbidden to marry with greater severity than where no such prohibition exists. Now, is that power restrained or limited by any provision of the Federal Constitution? That up to the adoption of the fourteenth amendment to that Constitution there was no such limitation, cannot for one moment be doubted. That amendment, or rather the only portion of it which can have any bearing upon this question—the first section—is as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This amendment, it will be observed, is both affirmative and prohibitory. The first clause makes all persons born or naturalized in the United States and subject to its jurisdiction citizens of the United States and of the State wherein they reside; it thus creates citizenship, but at the same time it recognizes that there is in this country a dual citizenship—a citizenship of the United States and a citizenship of the State. Each has duties attached to it, and to each belong certain rights and immunities; but all of such duties, rights, and immunities attached or belonging to the one citizenship are separate and distinct from those belonging or attached to the other; and, as will be seen hereafter, for his protection in each class of such privileges and immunities the citizen must rely upon the government from which he derives them; each being sovereign in its respective sphere, and the powers of each being separate and distinct and in no way antagonistic or conflicting. The second clause of the section is prohibitory and contains three limitations upon the powers of the States. By the first they are prohibited from abridging the privileges and immunities of citizens of the United States. We noticed above that citizenship is recognized and declared to be twofold; here we find the prohibition against a State abridging the privileges and immunities not of the citizen of the State, but of the citizen of the United States. The second prohibition forbids the State depriving any person of life, liberty, or property without due process of law; this prohibition shields not only the citizen, but every person, and is merely a reaffirmation of a principle which has always been recognized by our States, and was and is contained in every constitution which has been framed since the organization of our government. What the prohibition means is perfectly clear, and it is equally clear that it has no bearing upon this case. It means that no person shall be deprived of his life, liberty, or property except upon a judgment of a court of competent jurisdiction, after a trial had and conducted in the manner and form prescribed by law.

The third and last prohibition forbids the State from denying to any person within its jurisdiction the equal protection of its laws. Here it will be noticed again the benefit of the prohibition is extended to all persons within the jurisdiction of the State, without regard to citizenship. This was doubtless intended as much to prevent unjust discrimination against persons who are not citizens of the State as for any other purpose, as the clause immediately preceding it was intended to prevent the State from depriving any such person of life, liberty, and property without that process of law which it had provided for the protection of its own citizens. Does the act in question "abridge any of the privileges or immunities of citizens of the United States"? or "does it deny to any person the equal protection of the laws"? What are the privileges and immunities there referred to, and what constitutes a denial of the equal protection of the laws? Is the right of persons of different races to intermarry one of such "privileges and immunities?" and if not, does an act which forbids such intermarriage and punishes each violator of the law in the same way and to the same extent, a denial of the "equal protection of the laws"? The operation of this section is elaborately considered in the able and exhaustive opinion of Mr. Justice Miller in the

Slaughter-house Cases, 16 Wall., 36, and the extent and meaning of the several clauses is so clearly and forcibly stated that there really seems no ground for argument. There it is distinctly stated that the privileges and immunities protected by that amendment are those which belong to a person as a citizen of the United States as distinguished from those which belong to him as a citizen of the State. In that opinion, after defining the privileges and immunities which belong to a citizen as a citizen of a State, in the language of Judge Washington, as those "which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole*," the learned judge asks these questions: "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the State?" And on the following page of the opinion he answers those questions as follows: "We are convinced that no such results were intended by Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

Then he enumerates some of the privileges of a citizen of the United States, which are, among others, the right to enjoy in every other State of the Union the same privileges and immunities which the citizens of such State enjoy therein; the right to the protection of the Federal Government over his life, liberty and property, when on the high seas; the right to use the navigable waters of the United States penetrating the territory of other States; the rights secured by the thirteenth and fifteenth amendments, and other rights of like character. None of these rights, however, are of the class legislated upon by the law of Alabama now under discussion; that, if a right at all, belongs to that class of privileges which have always been left to the regulation of the local government. The purpose of the late amendments undoubtedly was to strengthen the hands of the Federal Government, and their effect is decidedly that way; but still the powers of the two governments remain separate and distinct; for, as is said in the same opinion, "Under the pressure of all the excited feelings growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they may have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation."

This question of the difference between the powers of the Federal and State governments, and as to what rights belonged to the citizen as a citizen of the United States, came again before this court in The United States *v.* Cruikshanks et al., 92 U. S., 542. In that case Chief Justice Waite, in speaking of the character of the Federal Government, says:

"The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. *Its powers are limited in number but not in degree.* Within the scope of its powers, as enumerated and defined, it is supreme and above the States, *but beyond it has no existence.* It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."

And again, on page 551, he says:

"The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

Under the influence of the principles above stated, it is held, in the decision in that case, that the right peaceably to assemble for a purpose other than that of petitioning Congress; to bear arms for a lawful purpose, and other rights which belong to that class which are controlled by "powers which relate to merely municipal legislation, or what was more properly called internal police," are among those which the Government of the United States "can neither grant nor secure to its citizens," and for their protection in which "the people must look to the States." Now, we have seen that the regulation of marriage is purely a power relating to internal police, a power which has been exercised by all governments. Nothing so affects the peace, good order, and morals of a people, and has so much influence upon society itself. Among all other police powers it is the one in which the community is more directly interested, and for that reason it is the one of all others which should be controlled by the local government. Nothing has such a tendency to break up society, engender bad feelings, and lead even to breaches of the peace, as marriages repugnant to the moral sense, or even the prejudices of the people of a community. And while the law-maker might deem such moral sense a perverted one, and such prejudices as unreasonable, yet it is his duty as a statesman to look at facts as he finds them, to respect even prejudices, if he believes that to do so is necessary to preserve the peace and good order of the community. Whether it is necessary, must be left to his discretion and judgment; and no one can be so capable of correctly deciding these questions as the local legislature, taken directly from the people to be affected by the legislation, composed of men who move in their midst and who know the sentiments and idiosyncracies of each citizen; hence the necessity of leaving such matters to the local government, and thus is demonstrated the wisdom of our fathers in framing a government complex in its character, but reserving to the local governments the exercise of those powers which most immediately affect the citizen, the family, and society. The principle so forcibly and clearly announced by the Chief Justice in the citations above, that beyond the "enumerated and defined" powers the Government of the United States "has no existence," and "that it can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction," are, it seems to me, in accord with the undoubted theory of our government, and the theory which is unaffected and unimpaired even by the recent amendments. Applying the principles there announced, and it seems to me that the question presented by this record is easily answered. The pertinent inquiry is, Is the regulation of marriage among the "enumerated and defined powers" of the Government of the United States? Is the right or privilege of a man or woman to marry whomsoever he or she may see fit one of the rights or privileges "expressly or by implication placed under the jurisdiction" of the United States? If these questions are answered negatively, then it follows necessarily that the right or privilege is one which this government "can neither grant nor secure to its citizens." That it must be answered negatively it is unnecessary further to argue, for the questions furnish their own answer.

For further authorities upon the question, as to the effect of the amendments upon the police powers of the States, I refer to—

Beer Company *v.* Mass., 97 U. S., 25.
Missouri *v.* Lewis, 101 Ib., 22.
Cooley's Con. Lim., 713.

The only other question remaining, then, is, Does the act in question deny to any person the equal protection of the law? It is a well-known fact in the history of this country that, prior to the abolition of slavery in most of the slave States, an offense committed by a slave or free negro was punished with much greater severity than the same offense was punished in a white man; in many instances such acts were treated as capital felonies when committed by the former, when, if committed by white persons, they were only punished by comparatively short terms of imprisonment. The object of this clause was doubtless to strike at such discriminations as those. This law contains no such discrimination. It denounces certain acts as crimes, and provides that the persons guilty of them shall be punished; the punishment imposed is placed alike upon the black and the white offender; no greater punishment is imposed upon the one than the other. The question then resolves itself at last back to the one I have heretofore discussed—has the State the power to forbid the intermarriage of the races? If it has, it has the power to impose a punishment upon those who violate its law forbidding such intermarriage, and to impose a punishment for acts of criminal intimacy between those included in such prohibition; and so long as there is no discrimination in the punishment imposed upon the white and that imposed upon the negro violator of the particular statute, there is no denial of the equal protection of the laws to any citizen.

The passage of such laws is a recognition of difference of races, but does not place upon either the badge of inferiority; they are based upon the idea of dissimilarity, which does not necessarily mean legal or civil inequality. It is a recognition of that fact so clearly and forcibly stated by Mr. Justice Agnew, in West Chester and Philadelphia R. R. Co. *v.* Miles, 55 Penn. State R., on page 213, in an opinion concurred in by such liberal men and able judges as Chief Justice Woodward and Justices Thompson and Strong:

> "The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply that, following the order of divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from *intermarriage.*"

This question has never been before this court, but has been before several of the State courts and also several of the lower courts of the United States, and in every instance the validity of such laws has been upheld. In addition to the authorities heretofore cited, and those cited in the opinion of the Supreme Court of Alabama, found in the record, I refer the court to the following:

Ex parte Kinney, 3 Hughes C. C., 1.
Ex parte Hobbs, 1 Woods, 537.
Bertonneau *v.* Board of Directors, 3 Ib., 177.
Opinion of Duval, District Judge, Texas, 5 Cen. L. J., 149.
State *v.* Gibson, 36 Ind., 389.
Ward *v.* Flood, 48 Cal., 36.
Scott *v.* The State, 39 Ga., 321.
State *v.* Bell, 7 Bax., 9.
Kinney *v.* Com., 30 Gratt., 858.
1 Bish. on Mar. & Div., 308–375.

This last very able and eminent writer is very emphatic in his declaration that "the complete jurisdiction of the States over marriage within their respective territorial limits remains in them as before" the adoption of the amendments.

In conclusion, then, I respectfully submit that it is clear—

1st. That each State has the power to say who of its citizens may marry, when they may marry, and how they may marry, and that this power is unlimited except by legislative discretion.

2d. That the power to forbid marriages between persons of different races carries with it the power to impose a greater punishment for acts of criminal intimacy between such persons than are imposed for the same acts committed by persons between whom marriage is not forbidden.

3d. That the power to regulate marriages is not one of those either expressly or by implication delegated to the United States, and that for the protection of his rights in connection therewith, if there are any such, the citizen must look to the States.

4th. That a law which punishes persons of each race in the same manner and to the same extent for its violation is not a discrimination against either race, nor does it deny to any person the equal protection of the laws.

Therefore it follows that this court cannot declare the law void because obnoxious to any provision of the Federal Constitution.

All of which is respectfully submitted.

H. C. TOMPKINS,
For Appellee.

16-586

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~308.~~ 45

BENJAMIN HAYDEN, APPELLANT,

VS.

CHARLES MANNING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 10, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 308.

BENJAMIN HAYDEN, APPELLANT,

VS.

CHARLES MANNING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 Be it remembered that on May 12th, 1876, there was duly filed in the circuit court of the United States for the district of Oregon a bill of complaint, in words and figures as follows, viz:

Bill of complaint.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

To the honorable judges of the said court:

Your orator, Charles Manning, the above-named complainant, humbly complaining, showeth unto your honours that your orator is a citizen of the State of California; that he resides in the county of Shasta, in said State; and Ben. Hayden, the above-named def't, is a citizen of the State of Oregon; that he resides in the county of Polk, in said State.

And your orator further shows that on or about the 1st day of December, A. D. 1848, one Bethuel Dove, a married man, the husband of
Rachel Dove, settled upon a part of the public domain in Ore-
2 gon, and which part of said public domain is now known as the
donation land claim of said Bethuel Dove & Rachel Dove; that the same is situated in said county of Polk and State of Oregon, and will hereinafter be more particularly described; that after the passage of the act of Congress of September 27, 1850, known as the act donating the public lands of the United States in Oregon to certain settlers, the said Bethuel Dove duly notified upon said claim under and in pursuance of the provisions of said act of Congress, and continued to reside upon and to cultivate said claim for a period of more than four consecutive years, and duly complied with all the provisions of said act and made proof of such settlement and residence before the proper officers of the land office in Orgeon, and being otherwise in every respect qualified, the
said officers of the land office afterwards and on the 15’ day
3 of Sept., 1874, duly issued to said Bethuel Dove and said Ra-
chel Dove, his wife, a final or patent certificate to said land claim, and that the north half thereof was duly designated by said officers of the land office aforesaid as the part enuring to the said Bethuel Dove, and the south half thereof as the part enuring to the said Rachel, to be held by her in her own right.

The following is a full description of the said claim, as shown by said certificate, to wit: Claim No. 54, being parts of sections 34 & 35, in T. 7 S., R. 4 W., bounded and described as follows: beginning at a point 19.50 chains east of the S. W. corner of said section 34, and running thence north 14.52 chains; thence S. 81° E. 12.30 chains; thence north 15.60 chains; thence E. 102.25 chains; thence south 57.33 chains; thence west 114.07 chains; and thence north 29.50 chains, to the place
of beginning, containing $638\frac{23}{100}$ acres. The north half to the
4 said Bethuel Dove, and the south half to his wife, the said Ra-
chel Dove. That prior to the issuance of the said certificate, but after the completion of the said four years' residence and cultivation of said claim as aforesaid, to wit, the 2’ day of March, 1859, the said Bethuel Dove having become indebted to one Wm. Griswold in a large sum of money, they, said Bethuel and Rachel Dove, executed

to one Wm. P. Lewis, then treasurer of said county of Polk, as such
treasurer, a mortgage upon the said south half, or wife's portion, of said
claim in order to obtain the loan of money with which to pay of’ the
said debt to the said Griswold. That the said mortgage was so exe-
cuted and given to secure the payment of the sum of about fifteen
hundred dollars, and the amount of money so obtained thereon was
about that sum, and was paid and applied upon the said debt
5 due the said Griswold, and which was the separate individual
debt of the said Bethuel Dove.

And your orator further shows and charges that at the time of the
execution of said mortgage last aforesaid, the said Rachel Dove, then
being a married woman as aforesaid, was induced to and did execute the
said mortgage upon her part at the solicitation of the said defendant;
that the said defendant was then and still is learned in the law, and a
lawyer by profession of the degree of att'y and counsellor, and was en-
gaged in the practice as such in the State and United States courts in
Oregon, and was at said time the att'y and confidential adveser of the
said Bethuel Dove and Rachel Dove, duly retained as such and acting
in that capacity in the transaction of divers business, and especially
the business in relation to the borrowing the said fifteen hundred dol-
lars for the purposes aforesaid, and that said def't prior to and
6 at the time of the execution of the said mortgage upon the part
of the said Rachel assured her that there would be no danger ot
her losing her said portion of said claim by executing the said mort-
gage, and in order to more effectually *to* allure her into securety in that
particular, and for the purpose, as your orator charges, of enabling him,
def't, to cheat and defraud said Rachel out of her said donation, as will
hereinafter more particularly be shown, promised the said Rachel that
he, def't, would mortgage his own farm-house before she, said Rachel,
should lose her said property; that through such solicitations and as-
surances said Rachel executed the said mortgage.

Your orator further shows that after the maturity of said debt which
said mortgage was given to secure, and on or about the 23’ day of Oct.,
1863, a suit was instituted in the circuit court of the State of Ore-
7 gon for the county of Polk in favour of J. Emmons, then treas-
urer of said county of Polk, as such treasurer and successor of
the said Wm. P. Lewis, as plaintiff therein, and against the said
Bethuel Dove and Rachel Dove, as def't to foreclose the said mortgage
and sell said mortgaged premises to satisfy said indebtedness. That
thereupon the said Bethuel and Rachel retained the said def't and em-
ployed him as their att'y and counsel in said suit, and who interposed
on their behalf a defence to the same; and that such proceedings were
thereupon had that afterwards and on the 18th day of Nov., 1863, that
the said plaintiff herein recovered a decree against the said def't,
therein, adjudging that said Rachel's said gift or property be sold to
satisfy the said decree, amounting to two thousand and fifty dollars and
seventy-three cents, legal-tender currency.

8 That thereupon a writ of execution was issued upon the said
decree directed to the sheriff of the county of Polk, command-
ing him to satisfy the said decree, with costs. That said sheriff, in pur-
suance of said execution, levied upon the said property of the said Rachel
and advertised the same for sale, in pursuance of the statutes of Oregon
in such cases mad’ and provided. That prior to the time of the sale
thereof, as so advertised, the said defendant called at the house of said
Rachel Dove to see her in regard to the said sale; that said Rachel was
not at home, but that def't left a verbal message for her, in which he

stated that he would make all necessary and proper arrangements to bid off said property for her benefit at said sale, and that he would fully protect and maintain her rights therein; that said message was
9 duly and promptly communicated to the said Rachel Dove, and in consequence thereof, and relying upon the honesty and integrity of the said def't, she did not attend said sale, and took no steps to secure her interest in said property.

That her said property at the time was worth the full sum of four thousand dollars, gold coin of the United States.

Your orator further shows that the said def't did attend said sale, and did bid in the said property in his own name, at the price or sum of twelve hundred and twenty-five dollars, in United States legal-tender Treasury notes, which at that time were only worth in gold coin 50 cts. upon the dollar, amounting to six hundred & twelve dollars and 50 cts. gold coin.

That after said sale said def't stated and represented, and caused the said Rachael to believe, that said land had been bid off in her name and for her benefit, and that the amount of money necessary for
10 her to pay to redeem the same was said sum of six hundred and twelve dollars and 50 cents, gold coin.

That relying upon such statement and representations, and acting upon such belief and upon the honesty and integrity of said def't, said Rachel did afterwards, and about July, 1864, pay to the said def't on account of his said bid, and to be applied upon the six hundred and twelve dollars and fifty cents as a part payment thereof, the sum of $200 in gold coin, which said def't received with the understanding and agreement that the same should be so applied.

That said Rachel and her said husband continued in possession of her said land for a long time after said sale, exercising acts of ownership over the same, and intending and expecting to redeem the same as aforesaid. That on or about August, 1865, while said Rachel
11 was in possession of the said land by one O. H. Smith as her tenant, the said def't, contriving and intending to disseize the said Rachel and to get into possession of said land, fraudulently induced and procured the said Smith to surrender the possession thereof to him, and that he has ever since that time remained in possession of the same, receiving the rents and profits thereof, which were and are of great value, to wit, of the reasonable value of $400 a year.

Your orator further shows that said Rachel never intended to allow her said land to be sold and the time for redemption to expire; that she could have made, and had it not been for the said promises and representation of the said def't would have made, other arrangements, and have secured the redemption thereof for her benefit.

That def't obtained a deed to the same from said sheriff, and
12 after acquiring possession of the premises as aforesaid claimed title and ownership thereof in his own right. That said Rachel has at divers times since def't obtained the deed and acquired possession demanded of him that he should restore to her said title and possession of said land so obtained as aforesaid, and that he account for the rents and profits thereof, and has offered to pay any difference that *that* might be found in def't's favour, but that def't has refused and still refuses so to do, and wholly denies said Rachel's title to said land and her rights and equities in the premises.

That said Rachel being very aged and feeble, and unable to prosecute her claim in the premises, afterwards, and on the 7' day of April, 1875, for a valuable consideration paid and secured therefore, granted, bargained, and conveyed all her interest in said land, together with any and all claim to the rents and profits thereof, and all her rights 13 and equities growing out of the same, to your orator, and that your said orator is now the lawful owner and holder thereof.

And your orator further shows that at the time of said grant, bargain, and conveyance aforesaid the value of the rents and profits of the said land, and which had been received by the said def't up to that time, had more than paid def't the balance due upon the purchase thereof at the said sheriff's sale, and that the said Rachel was the owner of the said land in equity and was entitled to a deed from def't to the same freed from any claim on the part of def't arising out of any payment of said purchase money and interest, or of any other claim in the premises whatever.

Wherefore your orator prays that the said def't may be decreed to be the trustee of the legal title to said portion of said donation land claim. That the value of the rents and profits thereof during the time that he has enjoyed the same may be ascertained, and a suf- 14 ficient part thereof, equal to the amount of purchase-money so paid by def't, less the said two hundred dollars, with interest thereon, and any other claims def't may rightfully have growing out of the transaction herein referred to, be set off against the same, so as to cancel all the claims def't has on account of any of the matters herein, or of any other thing he in equity and conscience may be entitled to claim in the premises, and that def't be decreed to convey to the pl'ff the said land, freed from all claims whatever, with such other further or different relief in the premises as may to your honors seem meet.

May it please your honours to grant unto your orator a writ of subpœna to be directed to the said def't, Ben. Hayden, thereby commanding him at a certain day to be and appear before your honours in the circuit court of the United States for the district of Oregon, and 15 then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honours *as* shall seem meet.

THAY & WILLIAMS,
G. W. LAWSON, AND
HILL, DURHAM AND THOMPSON,
Solicitors for Pl'ff.

UNITED STATES,
District of Oregon, ss:

I, Bethuel Dove, after being duly sworn, say that I am agent and att'y in fact for Chas. Manning, compl't in this suit, for the purpose of the prosecution thereof, and I further say that the foregoing bill of complaint is true. I further say that I make this verification instead of said complainant, for the reason that said complainant is not within said district, but is now in the State of Calfornia.

his
BETHUEL + DOVE.
mark.

Subscribed and sworn to before me this 13th day of Sept., A. D. 1875.

P. L. WILLIS,
U. S. Commissioner.

(Indorsed & filed May 12th, 1876. Ralph Wilcox, clerk.

16 And afterwards, to wit, on the 13th day of May, 1876, there was issued out of said court a subpœna, in words and figures as follows, to wit:

Subpœna ad respondendum.

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT. } No. 317. In equity.

The President of the United States of America to Benjamin Hayden, the above-named defendant, greeting:

You are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of June next, which will be the 5th day of June, A. D. 1876, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein Charles Manning is complainant and you are defendant, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 13th day of May, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth.

[SEAL.] RALPH WILCOX, *Clerk.*

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ I have served the same upon the therein-named Benjamin Hayden by exhibiting same to a member of his family over the age of 14 years, and by delivering to her personally a true copy thereof, together with a copy of the complaint in the within action, at Benjamin Hayden's residence, in said district, on the 17th day of May, A. D. 1876.

ABNER W. WATERS,
U. S. Marshal.
By W. P. BURNS, *Deputy.*

Fees, $

(Endorsed:) Returned and filed May 20, 1876. Ralph Wilcox, clerk.

17 And afterwards, to wit, on the 3d day of June, 1876, there was duly filed in said court a notice of appearance in said suit by said def't, in words and figures as follows, to wit:

Notice of appearance.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, PLAINTIFF, }
vs.
BENJAMIN HAYDEN, DEF'T. }

To Ralph , clerk of the above-named court:

SIR: You will please take notice that the above-named def't, Ben. Hayden, appears in the above-named court in the above-entitled action, and that we appear as his att'ys therein.

W. B. UPTON.
C. B. UPTON.

(Endorsed:) Filed June 3d, 1876. Ralph Wilcox, clerk.

18 And afterwards, to wit, on the 26th day of June, 1876, there was duly filed in said court exceptions to said bill of complaint, in words and figures as follows, to wit:

Exceptions.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT, }
vs.
BENJAMIN HAYDEN, DEFENDANT. }

And now comes the said deft, by Wm. Strong and W. W. Upton & Chas. B. Upton, his solicitors, and excepts to the bill of complaint filed herein by the said complainant, in this, that the several parts thereof herein specified are, and each of them is, impertinent and scandalous, and he moves that the said bill of complaint be referred, or that the court otherwise order, so that each of said several parts may be stricken out, namely the several parts of said complaint following:

First. Commencing with the words "on or about," in line 21, on page 1, and ending the word "Oregon," in line 16 and page 2.

Second. Commencing immediactly after the word "Oregon," in
19 line 16, on page 2, and ending with line 28, on pgge 2.

Third. Commencing with the word "that," in line 17, on page 3, and ending with the word, "aforesaid," in line 20, on page 3.

Fourth. Commencing with the words "to wit," in line 21, in page 3, and ending with the word "Dove," in line 12, page 4.

Fifth. Commencing with the word "and," in line 13, page 4, and ending with the word "def't," in line 20, on page 4.

Sixth. Commencing with the word, "that," in line 20, on page 4, and ending with the word "property," in line 23, on page 5.

Sixth. Commencing with the word "that," in line 23, on page 5, and ending with the line 25, on page 5.

Seventh. Commencing with the word "that," in line 9, on page 7, and ending with the word "property," in line 27, on page 7.

Eighth. Commencing with the word "that," in line 13, page 8, 20 and ending with the word "coin *him*," in line 21, on page 8.

9th. Commencing with the word "that," in line 13, on page 9, and ending with the word, "him" in line 21, on page 9.

Tenth. Commencing with the word "your," in line 27, on page 9, and ending with the word "benefit," in line 7, on page 10.

Eleventh. Commencing with the word "that," in line 25, on page 10, and ending with the word "premises," in line 27, on page 10.

Twelfth. Commencing with the word, "afterwards," in line 27, on page 10, and ending with the word "thereof," in line 9, on page 11.

Thirteenth. Commencing with the word "and," in line 9, on page 11, and ending with the word "sale," in line 18, on page 11.

Fourteenth. Commencing with the word "and," in line 18, on page 11, and ending with line 26, on page 11.

WM. STRONG & W. W. UPTON, &
CHAS. B. UPTON,
Sol., & of Counsel for the Def't.

RALPH WILCOX, *Clerk,*
By ED. WILCOX, *Deputy.*

20½ And afterwards, to wit, on Wednesday, the 29th day of November, 1876, the same being the 28th judicial day of the regular October term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING
vs.
BENJAMIN HAYDEN. } No. 317. November 29, 1876.

Now at this day comes the complainant in the above-entitled cause, by Mr. H. Y. Thompson and Mr. George H. Durham of counsel, and the said defendant, by Mr. W. W. Upton and Mr. J. N. Dolph of counsel, and by consent of parties, it is ordered that the motion to strike out parts of the bill of complaint be overruled pro forma, and that the defendant have leave to plead or demur.

21 And afterwards, to wit, on the 9th day of December, 1876, there was duly filed in said court by said defendant a demurrer to said bill of complaint, in words and figures as follows, to wit:

Demurrer.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT. }

This defendant, Benjamin Hayden, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill to be true in such manner & form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth: 1st. That the matters set forth and alleged in the said bill are not sufficient in equity to entitle the said complainant to the relief therein prayed, or to any relief.

2d. That there is in the said bill a defect of parties plaintiff.

3d. That the said plaintiff has not legal capacity to maintain this suit or to prosecute the cause of suit set forth in the said bill.

22 4th. That the alleged transfer from said Rachel Dove to the said plaintiff in said bill mentioned is therein shown to be invalid.

5th. The said bill shows that the alleged cause of suit in said bill set forth is a tort, and is not and has never been assignable.

6th. The said bill shows that if a cause of suit, as witness set forth, exists it exists in favour of the said Rachel Dove, and not in favour of the said plaintiff.

7. The said bill does not disclose or show any equity in favour of the said plaintiff.

Wherefore this def't demands the judgment of this honourable court whether he shall be compelled to mak' any fu'ther or other answer to the said bill or *or* any of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

W. W. UPTON &
CHAS. B. UPTON,
Solicitors for Def't.

23 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, W. W. Upton, one of the counsel for the def't herein, certify that in my opinion the foregoing demurrer is well founded in point of law.

W. W. UPTON.

(Endorsed:) Filed Dec. 9, 1876. Ralph Wilcox, clerk.

24 And afterwards, to wit, on the 10th day of September, 1877, the same being the judicial day of the regular April term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

Decree.

In the circuit court of the United States for the district of Oregon.

CHAS. MANNING
vs. } No. 317. Sept. 10, 1877.
BEN. HAYDEN.

This cause came on to be heard on the bill of the plaintiff and the demurrer thereto, and was argued by Mr. H. Y. Thompson, of counsel for the plaintiff, and Mr. E. C. Bronaugh, of counsel for the def't, and was taken underadvisement. And now at this day, it appearing to the court that the said plaintiff is entitled to the relief prayed for in his bill upon the facts therein stated, it is ordered and adjudged that said demurrer be, and the same is hereby, overruled, and that the def't have until 30 days from this date in which to answer said bill, on the payment of ten dollars costs to the plaintiff.

DEADY, *J.*

(Endorsed:) Filed and entered Sept. 10, 1878. R. H. Lamson, clerk.

25 *Decision in the U. S. circuit court.—Opinion by Judge Deady.*

U. S. circuit court, district of Oregon, Monday, September 10, 1877.

CHARLES MANNING *v.* BENJAMIN HAYDEN. } Suit in equity to declare a trust and for a conveyance.

(1) FRAUD.—A fraud practised by an agent or attorney upon his principal or client, whereby the former procures the legal title to real property to the prejudice and injury of the latter, will be relieved against in equity, by declaring the agent or attorney a trustee ex maleficio.

(2) TRUST ESTATE.—The cestui que trust can convey his estate; and such a conveyance passes an interest in the property, and not a mere right of suit.

DEADY, *J.*:

This suit is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to obtain a conveyance of a certain half section of land, situate in Polk County, and known as the
26 south half of the donation claim No. 54, the latter being parts of
sections 34 and 35 of township 7 south, range 4 west of the Wallamet meridian.

Substantially the bill alleges that the premises in controversy were the property of Rachel Dove, the wife of Bethuel Dove, the same being her half of the donation from the United States to said Bethuel and Rachel, in consideration of the occupation and cultivation of the same by the former, as a settler, under § 4 of the donation act of September 27, 1850; that on March 2, 1859, said Rachel and Bethuel executed a mortgage to the county aforesaid for about the sum of $1,500 upon said premises, which money was then obtained for and applied to the payment of a debt due from said Bethuel to William Griswold; that at the date of said mortgage the defendant was the attorney and confidential adviser of said Bethuel and Rachel in the matter of said loan and mortgage and otherwise; that the defendant for the purpose of enabling himself to cheat and defraud said Rachel out of said premises solicited her to execute
27 said mortgage, and assured her that he would mortgage his own
home before she should thereby lose her property, and that by means of said solicitations and assurances said Rachel was induced to execute said mortgage; that about October 23, 1863, suit was brought to foreclose said mortgage, in which said defendant, as the attorney for the mortgagors, appeared and interposed a defence; that afterwards a decree was given in said suit to the effect that said premises be sold to satisfy the sum of $2,050.73 in currency; that thereupon said premises were levied upon by the sheriff and advertised for sale; that prior to the date of such sale the defendant called at the house of said Rachel to see her concerning the same, but she being absent said defendant left a verbal message for her, "in which he stated he would make all necessary and proper arrangements to bid off said property for her benefit at said sale, and that he would fully protect and maintain her rights therein;" that said message was duly communicated to
28 said Rachel, and "in consequence thereof, and relying upon the
honesty and integrity of said defendant, she did not attend said sale, and took no steps to secure her interest in said property"; that said defendant bid in said premises, which were then worth $4,000 in gold coin, in his own name, for the sum of $1,225 currency, then not

worth more than $612.50 in gold coin; that afterward said defendant stated and caused said Rachel to believe that said premises "had been bid off in her name and for her benefit, and that the amount necessary for her to pay to redeem the same was the said sum of $612.50;" that, relying upon the statements and honesty of the defendant as aforesaid, said Rachel, about July, 1864, paid him the sum of $200 in gold coin upon said sum of $612.50, which he received with the understanding it should be so applied; that said Rachel and her said husband continued in the possession of said premises as owners, and intending to redeem the same as aforesaid, until about August, 1865, when the defendant, intending and contriving to disseize the said Rachel,
29 fraudulently procured one O. H. Smith, her tenant, to surrender the possession thereof to him, and has ever since retained the same, and received the rents and profits thereof to the value of $400 a year; that, had it not been for the promises and representations aforesaid, said Rachel would and could have made other arrangements and secured the redemption of the premises for her benefit; that defendant obtained a deed from the sheriff for said premises as purchaser at said sale, and since he obtained possession thereof as aforesaid claims to be the owner of the same in his own right, and has refused to convey the same to said Rachel, or account to her for the rents and profits thereof; that on April 7, 1875, she, being aged and infirm and unable to prosecute her claim to the premises, for a valuable consideration conveyed all her interest in the same and all claim for the rents and profits thereof to the plaintiff, and that at the date of such conveyance the rents and profits then received by the defendant had more than paid the balance due him, and the premises were in equity the property of said Rachel, and she was entitled to a conveyance of the same
30 from the defendant.

The defendant demurred to the bill and assigned divers causes of demurrer, but on the argument and in the briefs the only points made were, (1) that the alleged trust is void because it appears not to have been in writing, and (2) that at the date of the conveyance to the plaintiff his grantor, Rachel Dove, had no interest in the premises and nothing to assign except a mere right of suit, which is not assignable.

My impression is that the demurrer is not well taken. Upon the facts stated in the bill I think that the plaintiff is entitled to the relief sought.

After careful consideration of the argument and authorities submitted for the defendant, my impression is that this is not a case of an agreement within the statute of frauds, but of a fraud practiced by an agent or attorney upon his principal or client, whereby the former was enabled to acquire the legal title to the premises to the prejudice and wrong of the latter. In such cases equity will redress the wrong by raising or implying a trust in favor of
31 the injured party. The wrong-doer is held to be a trustee ex maleficio. (2 Lead. Cas. Eq., 708; Baker v. Whiting, 3 Sum., 482; Ryan v. Dox, 34 N. Y., 307.)

If my impression is correct upon this point, then the demurrer is not well taken upon the second point. If, notwithstanding the deed from the sheriff to the defendant, he is only the trustee of the estate, Rachel Dove was the owner of the premises in equity, and could convey the trust estate—her equitable interest—to the plaintiff. (Baker v. Whiting, supra.) And such a conveyance passes an interest in the property, and not a mere right of suit.

The demurrer is overruled, with leave to the defendant to answer within thirty days, upon terms. It is also to be understood that this opinion is expressed subject to correction on the final hearing, when the questions argued upon this demurrer may be considered in the light of all the pleadings and proofs in the case.

H. Y. Thompson, for the plaintiff.

E. C. Bronaugh, for the defendant.

MATTHEW P. DEADY,
District Judge.

(Endorsed:) Filed September 10th, 1877. R. H. Lamson, clerk.

32 And afterwards, to wit, on the 6th day of October, 1877, there was duly filed in said court by said defendant his answer, in words and figures as follows, to wit:

Answer.

In the circuit court of the United States for the district of Oregon.

Charles Manning, complainant,
vs.
Benjamin Hayden, defendant.

To the honourable the judges of the said circuit court:

The answer of the above-named defendant, Ben. Hayden, to the bill of complaint of Chas. Manning, the complainant herein, exhibited against him in this honourable court.

Def't, for answer to the complaint of complainant herein, says and alleges:

He admits that complainant has correctly stated the boundaries of that tract of land in which is included the parcel of land in controversy, but alleges that complainant has incorrectly described it by claim, section, and township. The land in controversy is not claim number 54, parts of sections 34 & 35, in township 7 south, of
33 range 4 west, but is claim No. 59, notification No. 1441, in township No. 8 south, of range 4 west of the Wallamet meridian, both of the same being, however, within the boundary lines as given.

As to the time or manner at or in which Bethuel Dove and Rachel Dove made and executed their mortgage upon the wife's portion of said land, or as to the circumstances under which the same was made and executed, def't had actually no information whatever, and he denies that the said Rachel Dove was in any way or manner, either directly or indirectly, induced or advised by def't to make or execute the mortgage referred to in the said bill of complaint as made to one William P. Lewis, treasurer of Polk County, State of Oregon.

Def't further answering thereto shows and alleges unto your honours that he was not present at the locality where the said mortgage
34 was executed at the time of the execution of the same; that he was never in any way or manner, either professionally or otherwise, consulted by the said Rachel Dove as to the said mortgage; that he had neither part nor lot therein, though it is true that at some time, either before or after the making & execution of said mortgage the exact time def't does not now remember, said Rachel Dove did ask def't to explain the difference between a deed and a mortgage, which def't did; but that as to any particular or special mortgage to said Wm. P. Lewis, treasurer as aforesaid, def't avers that he never was asked for an opinion. And the defendant avers that the conversation

aforesaid was all that ever passed between himself and the said Rachel Dove in reference to a mortgage, and that he was not aware that it was her intention or purpose to join with her husband in mortgaging her separate property or realty to said Lewis until long after 35 the same was fully and completely done and executed.

Defendant further answering denies that before and at the time of the making of said mortgage, or at any time, he was the att'y or the confidential adviser of the said Bethuel or Rachel Dove, or that he ever was in any way whatever consulted, professionally or otherwise, by said Rachel Dove as to her separate or general business, or specially as to the effect of said mortgage upon her said separate property, and alleges that he never at any time bore to her the relation of attorney or confidential adviser in divers or any business whatever, and denies that she ever at any time consulted him in reference to borrowing the said fifteen hundred dollars, or that he had information thereabout at all until long after the same had been done. Defendant, how- 36 ever, admits that he had before that time done some general business for the said Bethuel Dove, and had done and performed for him services, professionally and otherwise, but was not consulted by him as to borrowing the said fifteen hundred dollars, or the making of said mortgage, and alleges the truth to be that the said transaction was wholly done without his knowledge, and that he did not know anything about the transaction until long after the same was consum'ated, the truth thereabout being that the transaction was the ordinary one of a debtor mortgaging his property for one debt in order to pay another, so far as def't is informed, and that whatever professional assistance in the making of said mortgage, if any, the said Bethuel and Rachel Dove, or either of them, required they obtained from some person other than the defendant.

Def't further answering denies and says it is wholely untrue that 37 either prior to or *or* at the time of the making of said mortgage to the said Lewis, treasurer as aforesaid, he assured the said Rachel that there would be no danger of her losing her said portion of her said land claim by executing said mortgage; and he denies that he had any purpose, desire, or intention of alluring her into security in the particular last aforesaid, or that he did allure her into security thereabout, or that he had, in conjunction with such fanciful purpose of allurement or otherwise, any purpose, design, or intention of cheating or defrauding said Rachel out of her said donation land claim, or that with any such purpose or otherwise he promised the said Rachel he would mortgage his own or any other home-farm before she, the said Rachel, should lose her said property, or that, through such or any solicitations or assurances on his part, she, the said Rachel, was induced to ex- 38 ecute the said mortgage.

Defendant further answering thereto shews and alleges to your honours that at the time the said mortgage was executed, to wit, on the 2d day of March, A. D. 1859, he had but little property, and that his entire real property was not worth more than $400.

Defendant admits that a bill was filed as alleged by the complainant to foreclose said mortgage, but he denies that he was retained or employed by said Bethuel and Rachel Dove, as att'y or counsel, to make their defense therein, and alleges the truth thereabout to be that said Bethuel Dove retained def't to obtain for him time, if he could, alleging that there was no defense to the suit; and that thereupon def't interposed a demur'er to said bill, which was overruled, whereupon the decree of foreclosure as prayed for was awarded.

Def't wholely denies that he ever at any time after said land was
advertised for sale by *by* the sheriff called to see said Rachel
39 Dove in regard to said sale, or that he at said time, or at any
time, left for her any word or message in effect that he would
make all necessary or proper or any arrangements to bid off said property
for her benefit at said sale, or that he would fully or otherwise
protect or maintain her rights therein; and def't says that it is wholly
untrue that there ever was in any way, either expressly or impliedly,
any such agreement or understanding between said def't & said
Rachel Dove, or that there was any understanding in substance or
effect like unto it between def't and said Rachel.

On the contrary the def't alleges the truth to be thereabout that said both Bethuel and Rachel Dove expressed to said def't before said sale was had their inability to save said land, and also their desire, as it was to pass out of their hands, that the def't should buy the same for his own use.

Def't further answering denies that any such alleged message
40 as aforesaid was ever in any way by his direction or authority
conveyed to said Rachel, or that her confidence in any such arrangement
or agreement, or in the integrity or honesty of def't, had aught
to do with inducing said Rachel Dove to not attend the said sale or
to refrain from taking steps to secure her interests in said property, and
def't denies that at the time of said sale the said separate property of
said Rachel was worth the sum of $4,000 in U. S. gold coin, or any
greater sum than $1,225, the amount for which said property was sold
at public auction to def't. And in this connection def't alleges that
the whole mortgage debt for which in the foreclosure suit against the
said Bethuel and Rachel Dove by said treasurer said decree was had
was $2,052.75, and $23.40, costs; that the said land was sold after
having been twice adjourned for lack of bidders, and that when
41 the same was sold def't was the highest bidder; that the sale
was actually made on the 5' day of March, 1864; that on the
26th day of April next, following, J. M. Butler, sheriff of Polk County,
made and executed his deed to def't, and the same was duly filed and
recorded in the records of deeds of Polk County on the 27th day of
May next, following.

Def't has no information as to whether, at the time of said sale, U. S. Treasury notes were worth only 50 cts. in gold coin, or as to what they were then worth. But he alleges that the said Bethuel and Rachel Dove obtained credit upon their said debt to the treasurer, for which the decree aforesaid was had against them, the full credit of $1,177.50, which was the amount the land sold for, less the costs.

Def't denies that after the said sale, or at any time, he stated or represented
to said Rachel Dove, or that he caused her to believe, that
42 said land had been bid off in her name or for her benefit, or that
the amount of money necessary for her to pay in order to redeem
the *sum*' was $612.50 in gold coin, or that there ever was any such conversation
or agreement or understanding whatever between him and
said Rachel. And he wholly and unqualifiedly denies that said Rachel
did, at any time, either relying upon such alleged statements or representation
or belief, or upon the honesty and integrity of defendant, or
that she did ever, at any time, in any way or manner, pay or cause to
be paid to def't, on account of any such pretended arrangement for redemption,
on the day of July, 1864, or at any other time, $200 *dollars*
in gold coin, or anyother sum whatever.

Def't further answering hereto alleges that it is wholly untrue that

there ever was any such agreement or understanding, or anything akin
thereto, or that any money ever was paid in pursuance thereof,
43 or that he ever received from her $200 *dollars*, or any other sum
whatever, upon any understanding or agreement that the same
was to be so applied. And def't further answering hereto says that anterior to the 26th day of March, 1864, the day of the said sale, there was no agreement whatever, either expressed or implied, between def't and either Bethuel or Rachel Dove in reference to the redeeming or b'ying back the said land; but afterwards, and after the sale had been duly confirmed by the court, and def't had taken and duly recorded the sheriff's deed, whereby he was fully invested in his own right with the title to said land, and some time in the summer of 1864, said Bethuel Dove came to this def't and did propose to buy the same from def't, expressing at the time to def't his desire to retain the same, whereupon
def't replied to said Bethuel that he did not think that he would
44 be able to buy the same, but if he, the said Bethuel, would pay def't
the amount he had paid, to wit, $1,225, and the interest thereon
at the rate allowed by law, and pay the same within one year from the date of the sheriff's sale to def't, that he, said def't, would sell him said land for said amount; that thereupon said Bethuel paid to def't $200 *dollars* gold coin, for which def't gave him a receipt in writing, and the agreement was thereupon made that if said Bethuel failed to pay the balance of said sum within the said period of time the said $200 *dollars* was to be applied as rent-money for the use of said land; that within the year said Bethuel was so occupying said land under said agreement, in addition to using the same for cropping purposes, he cut and sold valuable timber off of said land, in amount, as def't believes, of the value of $400; and def't alleges that during the year,
and just before the end thereof, def't remonstrated with said
45 Bethuel for thus injuring the property, and he thereupon became
offended and moved away from said land, and rented the same
to one O. H. Smith, said Bethuel, however, retaining possession of about 30 acre' of said land, and cropping the same for the second year, over and against the remonstrance, however, of def't.

Def't wholly denies that said Rachel and her husband, or either of them, continued in possession of said land, exercising acts of ownership over the same, any otherwise than as under the agreement aforeherein recited.

Def't further answering denies that said Rachel ever had, after the sale to himself, any possession of said land as her own, either by said O. H. Smith or otherwise, or that he, contriving or intending to disseize the said Bethuel or Rachel, fraudulently induced or procured said
Smith, or in any way procured said Smith, to surrender the pos-
46 session thereof to him; and he denies that the rental value of
said land was or is $400 per year, or any greater sum than shall
be presently herein stated.

Def't alleges the truth to be that he did not receive the possession of said land from said Smith at all, the said Smith having, but wholly without authority, sublet the same to one Moses Clark, and def't allege*ges* that he demanded and recovered from said Clark about $92.50 for the rental value thereof, that being all that the def't could obtain. Whereupon, on or about the 1st day of Oct., 1865, he, said Clark, quit and abandoned the possession thereof, and thereupon def't entered upon and took possession actually of the said land; and at the same time, without re'onstrance, objection, or opposition on the part of said Bethuel Dove, he, Dove, turned over to the def't the possession of

the 30 acres so by him retained as before herein recited, since
47 which time defendant has been in the open and notorious possession of the same, claiming and holding it as his own exclusive property.

Def't further answering alleges that he has no information whatever whereby he can form a belief as to whether said Rachel ever intended to allow her said land to be sold or the time for redemption to expire, but alleges that if she intended to redeem as a redemption she never at any time or manner proceeded as under the law she was required; but he denies that any promises or representations of his to said Rachel, or any written or verbal messages sent to her by or through him, prevented her from making proper arrangements to have such redemption.

Def't wholly denies that said Rachel Dove has at divers times, or at any time, demanded of him that he should restore to her the title
48 and possession of said land, or that she has ever demanded of him that he should account to her for the rents and profits of the said land, or that she has ever offered to adjust or pay any difference to def't that might be found in his favor; and he alleges that she never has at any time since the date of the sheriff's deed to def't had any rights or equities whatever in said land or made claim thereto.

Defendant denies that on the 7th day of April, 1875, or at any other time, said Rachel Dove, for a valuable or any consideration whatever, granted or bargained or conveyed her inter'st in said land, or her rights or claim for rents and profits thereof, to complainant, or that complainant is now in good faith the lawful owner thereof, and denies that on the said 7th day of April, 1875, or at any other time since said sale and conveyance from the said sheriff to said def't, said Rachel was the owner in equity or otherwise of said land, or any part
49 thereof, or that she was entitled to a deed from def't for the same, free from claim, on account of money so paid as aforesaid by him, or in any manner whatever.

Def't, further answering, says that at the time he bought said land the same was reasonably worth the rental of $200 *dollars* per annum, but that since the year 1865 def't has had about 160 acres of said land cleared and broken up for farming purposes, at an expense of about $480 *dollars*; placed 600 panels of post and plank fence around said premises, of the reasonable value of 90 cents per panel, amounting in the aggregate to the sum of $540 *dollars*; placed other fencing around said premises, of the reasonable value of $400 *dollars*, and rebuilt barn and repaired dwelling-house on said premises, at a cost of about $300 *dollars*; since which time the annual rental value of said prem-
50 ises has been about $300. And def't, further answering, would show to your honours that since the time of his purchase of said premises as his own, and in his own right, that he has paid the taxes on the said premises, amounting to the sum of $200 *dollars*.

Def't, further answering, denies all fraud or fraudulent practices, either in intention or in act, and alleges that the said premises were bought by him in good faith as his own; that he has fully paid for the same; that the said Bethuel Dove has never paid to def't, or offered to pay him, any sum of money whatever, save the *the* $200 *dollars* as aforesaid, and that the rental of said land and the timber cut therefrom and sold by said Bethuel, and the proceeds thereof appropriated to his own use, is more in amount than the sum of $200 *dollars*, and the distinct and positive agreement that the said sum was to be applied on the rent if he (said Bethuel) should make default in paying def't as

51 aforesaid within one year from the date of the purchase of said premises by said def't, at said sheriff's sale.

Def't, further answering, states that the said contract between def't and said Bethuel Dove, with relation to the sale of said land by the def't to him, was wholly verbal and was never reduced to writing, and was and is therefore null and void; and that more than six years have elapsed since the expiration of the said year within which said Bethuel was to have paid def't for said land, under said agreement, and since said Bethuel abandoned the possession of said land and refused to complete said contract with regard to the purchase thereof from the def't.

Wherefore, the premises considered, def't prays that said bill of complaint be dismissed, and that def't be decreed his costs and disbursements in this suit.

WILLIAM H. EFFINGER &
DOLPH, BRONAUGH, DOLPH & SIMON,
Sol. for Defendant.

52 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, Benjamin Hayden, being duly sworn, say on oath that I am the def't in the above-entitled suit, whose answer the foregoing is; that the denials, responses, answers, statements, and allegations in said answer contained, so far as 'tated of my own knowledge, are true, and so *as* far as made and stated upon information and belief, I believe them to be true; so help me God.

B. HAYDEN.

Sworn and subscribed before me this 5th day of Oct., A. D. 1877.
R. H. LAMSON, *Clerk.*

(Endorsed:) Filed Oct. 6th, 1877. R. H. Lamson, clerk.

53 And afterwards, to wit, on the 1st day of November, 1877, there was duly filed in said court by said complainant his replication, in words and figures as follows, to wit:

Replication.

In the circuit court of the United States for the district of Oregon,

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

The replication of Charles Manning, the complainant, to the answer of Ben. Hayden, def't, filed in the above-entitled suit.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant for replication thereunto, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered with by said def't, and that the answer of said def't is very uncertain, evasive, and insufficient in the law to be replied with by this repliant. Without that, that any other matter or thing

54 in the said answer contained material or effectual in the law to be replied with, and not herein and hereby well and sufficiently

replied unto, confessed or avoided, traversed or denied, is true. All of which matters and things this repliant is ready to aver, maintain, and prove, as this honourable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

HILL, DURHAM & THOMPSON,
G. W. LAWSON, & THAYER & WILLIAMS,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, B. Dove, being sworn, *say* on my oath say the matters and things stated in the foregoing reply are true of my own knowledge; that I am the agent of the complainant, Chas. Manning, and that said complainant is not within the district of Oregon.

his
B. + DOVE.
mark.

Subscribed & sworn to before me this 31' day of Oct., A. D. 1877.
GEO. H. DURHAM,
Notary Public for Or.

Due service of copy hereof is hereby acknowledged this Nov. 1st, 1877.

J. N. DOLPH,
One of Sol. for Def't.

Endorsed & filed Nov. 1st, 1877. R. H. Lamson, clerk.

55 And afterwards, to wit, on the 31' day of December, 1877, there was duly filed in said court a notice, in words and figures as follows, to wit:

Notice to take testimony orally.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING
vs.
BENJAMIN HAYDEN.

To the above-named def't Benjamin Hayden, & W. H. Effinger, & Dolph & Bronaugh, Dolph & Simon, his att'ys:

You are hereby notified that the complainant herein desires the evidence to be adduced in the above-entitled cause to be taken orally where such witnesses reside in the State & district of Oregon, in Portland, in said district, before W. B. Gilbert, esq., the regularly appointed examiner of said court; and you will further take notice that the 3' day of January, 1878, at 10 o'clock a. m., has been appointed by said examiner to begin taking testimony in said cause.

W. W. THAYER & HILL,
DURHAM & THOMPSON,
Sol. for Complainant.

Service hereof by copy acknowledged this 19th day of Dec., 1877.
W. H. EFFINGER,
Of Counsel for Def't.

(Endorsed:) Filed Dec. 31, 1877. R. H. Lamson, clerk.

56 And afterwards, to wit, on the 8th day of January, 1878, there was duly filed in said court a stipulation, in words and figures as follows, to wit:

Stipulation.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

It is hereby stipulated between the parties to the above-entitled suit that the time for taking testimony herein be and the same is hereby extended so that complainant shall have until the 15th day of Feb. within which to complete the taking of testimony on his behalf, and that thereafter def't shall have until the 1st day of April, A. D. 1878, to complete the taking of testimony on his behalf in this cause, and thereafter pl'ff shall have 10 days to introduce*d* his rebutting testimony.

E. C. BRONAUGH,
Of Sol. for Def't.
H. Y. THOMPSON,
Of Sol. for Pl'ff.

(Endorsed:) Filed Jan. 8, 1878. R. H. Lamson, clerk.

57 And afterwards, to wit, on the 8th day of January, 1878, there was duly filed in said court an affidavit, in words and figures as follows, to wit:

Affidavit of residence of witness Elizabeth Manning.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING
vs.
BENJ. HAYDEN.
In the matter of issuing a commission to take the testimony of Elizabeth Manning, &c.

DISTRICT OF OREGON:

I, H. Y. Thompson, being duly sworn, say that I am one of the solicitors for complainant in the above-entitled cause. That Elizabeth Manning, a witness on behalf of complainant, for the taking of whose testimony a commissioner herein is asked, is a resident of Fall River Mills, Shasta County, State of California, and is now residing at said place; that her said residence is more than one hundred miles from the place of the trial of said cause; that the above statements are made on information and belief; that the nature and sources of my information are statements made to me by Bethuel Dove, of Polk County,
58 Oregon, who is the father of said Elizabeth Manning.

H. Y. THOMPSON.

Subscribed and sworn to before me the 7' day of January, 1878.

[NOTARIAL SEAL.]

C. A. SWEEK,
Notary Public for Oregon.

Due service of the within affidavit is hereby acknowledged, and a receipt of a copy thereof admitted the 7th day of January, 1878.

E. C. BRONAUGH,
Off Att'ys for Def't.

(Endorsed:) Filed Jan. 8, 1878. R. H. Lamson, clerk.

59 And afterwards, to wit, on the 13th day of February, 1878, there was duly filed in said court a stipulation, in words and figures as follows, to wit:

Stipulation for time to take testimony.

In the circuit court of the United States for the district of Oregon.

CHAS. MANNING
vs.
BENJAMIN HAYDEN.

It is hereby stipulated that complainant's time for taking his testimony herein be extended to, and including, March 15, 1878; that def't have sixty days thereafter in which to take his testimony, and that complainant have ten days after the closing of def't's testimony within which to take his rebutting testimony, and that an order of court may be entered in compliance with the terms of this stipulation.

Feb. 13, 1878.

G. W. LAWSON & THOMPSON,
Att'ys for Complainant.
E. C. BRONAUGH,
Of Att'ys for Def't.

(Endorsed:) Filed Feb. 13th, 1878. R. H. Lamson, clerk.

60 And afterwards, to wit, on the 11th day of June, 1878, there was duly filed in said court a notice, in words and figures as follows, to wit:

Notice to take testimony at Salem.

In the circuit court of the United States for the district of Oregon.

C. MANNING, PLAINTIFF,
vs.
BEN. HAYDEN, DEF'T.

To C. Manning, and Messrs. Hill, Durham & Thompson, and Geo. W. Lawson, his att'ys:

GENTLEMEN: You will please take notice, on Thursday, the 25th day of April, 1878, at the hour of 1 o'clock p. m. of said day, in the city of Salem, county of Marion, and State of Oregon, and at the county court-room in the county court-house at said place, we will proceed to take the testimony of Ben. Hayden and other witnesses for def't in the above-entitled suit. That we will take the said testimony before Wm. B. Gilbert, esq., examiner, and that if we fail to finish the taking of said testimony on said day we will proceed with the taking thereof from day to day until we shall have finished the same, subject to such adjournments as may be ordered or as may be agreed upon.

61 DOLPH, BRONAUGH, DOLPH, SIMON,
W. H. EFFINGER,
Att'ys for Def't.

(Endorsed:) Filed June 11th, 1878. R. H. Lamson, clerk.

62 And afterwards, to wit, on the 30th day of September, 1878, there was duly filed in said court a notice, in words and figures as follows, to wit:

Notice to set cause for hearing.

In the circuit court of the United States for the district of Oregon.

ELIZABETH MANNING
vs.
BENJ. HAYDEN.

To the above-named defendant, and Messrs. W. H. Effenger, Dolph, Bronaugh, Dolph & Simon, his att'ys:

You will please take notice that on Monday next, Sept. 30, 1878, at the hour of 10 o'clock a. m., the pl'ff will move the court to set down for hearing the above-entitled cause.

Sept. 25, 1878.

THAYER & WILLIAMS,
G. W. LAWSON, &
HILL, DURHAM & THOMPSON,
Pl'ff's Sol.

(Endorsed:) Filed Sept. 30, 1878. R. H. Lamson, clerk.

63 And afterwards, to wit, on the 7th day of October, 1878, the same being the judicial day of the regular October term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

Order setting cause for trial.

In the circuit court of the United States for the ninth judicial district of Oregon.

CHARLES MANNING
vs. No. 317. Oct. 7th, 1878.
BENJAMIN HAYDEN.

Now, at this day, come the complainant, by Mr. H. Y. Thompson, of counsel, and the def't, by Mr. J. N. Dolph, of counsel, and, on motion of said complainant it is ordered that this cause be set for trial on Friday, Oct. 25, 1878.

DEADY, *J.*

Endorsed and filed Oct. 7, 1878. R. H. Lamson, clerk.

64 And afterwards, to wit, on the 25th day of October, 1878, there was duly filed in said court a motion by said defendant, in words and figures as follows, to wit:

Motion to suppress depositions.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

Now comes def't and moves the court to suppress the depositions on the part of the complainant, taken in claimed rebuttal, because the same were taken after the time fixed by stipulation for taking testimony had expired, and especially that the deposition of E. P. Dove be suppressed as far as the same relates to a claimed conversation between said witness and def't, on the ground that the same is properly testimony in chief and should have been given when the witness first testified.

E. C. BRONAUGH,
W. H. EFFENGER,
Sol. for Def't.

(Endorsed:) Filed Oct. 25, 1878. R. H. Lamson, clerk.

65 And afterwards, to wit, on the 20th day of January, 1879, the same being the judicial day of the regular October term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

Decree.

CHARLES MANNING
vs.
BENJAMIN HAYDEN.
No. 317. January 20, 1879.

This cause having been heretofore heard on the bill, answer, reply, exhibits, and evidence, and argued by counsel and taken under advisement by the court, said complainant appearing by Messrs. George W. Lawson, H. Y. Thompson, and Claude Thayer, of counsel, and said defendant appearing by Mr. E. C. Bronaugh and Mr. W. H. Effinger, of counsel; and now at this day the court, being fully advised in the premises, does find that the defendant purchased the premises in the pleadings mentioned and hereinafter described, at the sheriff's sale thereof, on March 5th, 1864, as the agent and attorney of said Bethuel and Rachel Dove for the sum of twelve hundred and twenty-five dol-
66 lars in U. S. legal-tender notes, then equivalent in value to seven hundred and ninety-six dollars and twenty-five cents in gold coin; and afterwards, to wit, on April 26, 1864, received the conveyance thereof from the said sheriff in his own name, but in fact as the trustee of said Bethuel and Rachel, in trust that he would permit them to remain in possession thereof, and reconvey the same to them or to their assigns upon the repayment to him of said sum of seven hundred and ninety-six dollars and twenty-five cents in gold coin, with lawful interest; and that said defendant wrongfully and contrary to said trust took possession of said premises on or about October 31st, 1865, and has held the same in possession ever since, and taken the rents and profits thereof of the yearly value of two hundred and fifty dollars to his own use and benefit; that such rents and profits so received by the defendant, together with the sum of two hundred dollars in gold coin, received
67 by the defendant on July 26, 1864, from said Bethuel Dove in part repayment of said sum of seven hundred and ninety-six dollars and twenty-five cents, with lawful interest thereon, exceed the said sum of seven hundred and ninety-six dollars and twenty-five cents, with lawful interest thereon, together with the sum of two hundred dollars taxes paid by the defendant, and the sum of one thousand dollars, the present *a*value of the permanent improvements put upon the

premises by the defendant, by the sum of twenty-five hundred and seventy-six dollars and twenty-two cents; and that at and before the commencement of this suit, to wit, on April 7, 1875, the complainant succeeded to all the rights of said Bethuel and Rachel Dove in and to the premises and to the rents and profits thereof by virtue of a valid conveyance of the same made to him by said Bethuel and Rachel Dove.

Therefore it is adjudged and decreed that said defendant do within
68 sixty days from the date hereof convey to said complainant, by a good and sufficient deed, with proper covenants against his own acts, to be prepared and settled before the master of this court, the premises described in the pleadings, to wit, the south or wife's half of the Bethuel Dove donation land claim, the same being notification numbered fourteen hundred and forty-one, claim numbered fifty-nine, being parts of sections numbered two and three, in township numbered eight south, of range numbered four west of the Wallamet meridian, situate in Polk County, Oregon, and within sixty days do deliver to said complainant the possession of said premises, and do pay to said complainant his costs and disbursements herein expended, and that in default thereof execution issue therefor.

(Signed) DEADY, *J.*

(Endorsed:) Filed January 20, 1879. R. H. Lamson, clerk.

69 *Decision in the U. S. circuit court, Deady, J.*

U. S. circuit court, district of Oregon, Monday, January 20, 1879.

CHARLES MANNING
vs.
BENJAMIN HAYDEN.
No. 317. Suit in equity to compel conveyance.

(1) AGENT—PURCHASE OF REAL PROPERTY.—Where a person acquires the legal estate in real property as the agent of another, or upon a trust and confidence that he will acquire it for the benefit of such other, equity will imply a trust in favor of the latter and compel the purchaser to account to him accordingly.

(2) STATUTE OF FRAUDS.—Such a transaction is not within the statute of frauds, and therefore the trust need not be manifested by a writing—the law implying it from the circumstances of the case.

(3) STATUTE OF LIMITATION.—Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; but each case depends upon its own nature and circumstances—the court taking the statute as a guide or suggestion rather than a command.

(4) ATTORNEY AND CLIENT.—Where an attorney is employed by the defendant in a suit to enforce the lien of a mortgage the relation of attorney and client continues until the final determination of the matter by the confirmation of the sale, unless the attorney's employment was expressly otherwise limited, or he was discharged in the mean time with the consent of his client or by the order of the court.

(2) SAME.—An attorney who purchases for himself his client's property at a judicial sale thereby acquires an interest contrary to his duty as attorney, and therefore the purchase will be held void or the attorney a trustee for the client, at the option of the latter, unless it satisfactorily appears that he was in no wise injured or prejudiced thereby.

DEADY, *J:*

This suit is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to compel a conveyance of certain premises situate in Polk County, containing 319 acres, and known as the south half of the Bethuel and Rachel Dove donation, the same being parts of sections 2 and 3, in township 8 south, of range 4 west of the *the* Wallamet meridian.

Substantially, the bill alleges, that the premises in controversy were the property of said Rachel, the wife of said Bethuel, the same being her half of the donation aforesaid, which was made by the United States to said Bethuel and Rachel in consideration of the occupation of the same by the former as a settler, under section 4 of the donation act of September 27, 1850, (9 stat., 497), from and after December 1, 1848; that on March 2, 1859, said Bethuel borrowed $1,550 from the county aforesaid to pay the balance of a debt then due one William Griswold, and upon the same date said Rachel and her husband executed a mortgage of the premises to secure the payment of said loan; that at the date of the said mortgage the defendant was a practicing attorney, and was the attorney and confidential adviser of said Bethuel and Rachel in the matter of said loan and mortgage and otherwise; that the defendant, for the purpose of enabling himself to cheat and defraud said Rachel out of her donation, solicited her to execute said mortgage and assured her that he would mortgage his own home farm before she should thereby lose her property, and that by means of such solicitations and assurances she was induced to execute said mortgage; that on October 23, 1863, suit was brought to enforce the lien of said mortgage in which the defendant as the attorney of the mortgagors appeared and made a defence thereto, notwithstanding which, on November 18, 1863, a decree was given in said suit to the effect that said premises should be sold as upon execution to satisfy the sum then due upon said loan—$2,050.73 in currency—together with the costs of suit, and that thereupon said premises were advertised for sale; that prior to the date of such sale the defendant informed said Rachel that he would see that the property was bid off for her benefit and would protect her rights therein, and
70 that in consequence of such information, and relying upon the honesty and integrity of said defendant, she did not attend such sale and took no steps to secure her interest in said property; that said premises at the sale thereof were worth $4,000 in gold coin, while the defendant bid in the same in his own name for the sum of $1,225 in currency, then not worth more than $612.50 in gold coin, and afterward stated and caused said Rachel to believe that said premises "had been bid off in her name and for her benefit and that the amount necessary for her to pay to redeem the same was the said sum of $612.50"; that relying upon such statements and the honesty of the defendant as aforesaid, said Rachel, in July, 1864, paid defendant $200 in gold coin upon said bid, which he received with the understanding it should be so applied; that said Rachel and her husband continued in the possession of said premises as owners, and intending to redeem the same as aforesaid, until about August, 1865, when the defendant, intending and contriving to disseize the said Rachel, fraudulently procured her tenant, one O. H. Smith, to surrender the possession thereof to him, and has ever since retained the same and received the rents and profits thereof, to the value of $400 a year; that but for the promises and representations of the defendant as aforesaid, said Rachel could and would have made other arrangements and secured the redemption of the property for her benefit; that the defendant afterward obtained a deed to said premises, as the purchaser thereof, from the sheriff making the sale,

and claims to be the owner of the same in his own right, and refuses to convey the same to the said Rachel or account to her for the rents and profits thereof; that on April 7, 1865, said Rachel being aged and infirm and unable to prosecute her claim to the premises, for a valuable consideration conveyed the same and all her claim for rents and profits to the complainant, and that at the date of such conveyance the rents and profits then received by the defendant had more than paid the balance due him, and the premises were in equity the property of said Rachel and she was entitled to a conveyance of the same from the defendant.

The defendant demurred to the bill for divers causes, but upon the argument only insisted upon two: (1) that the alleged trust not being in writing is void; and, (2) that at the date of the conveyance aforesaid to the complainant, his grantors had no interest in the premises, and nothing to assign except a mere right of suit, which is not assignable.

The court, Deady, J., overruled the demurrer, saying: "Upon the facts stated in the bill I think that the plaintiff is entitled to the relief sought. After a careful consideration of the argument and authorities submitted for the defendant, my impression is, that this is not a case of mere agreement within the statute of frauds, but one of a fraud practiced by an agent or attorney upon his principal or client, whereby the former was enabled to acquire the legal title to the premises, to the prejudice and wrong of the latter. In such cases equity will redress the wrong by raising or implying a trust in favor of the injured party. The wrong-doer is held to be a trustee ex maleficio. (2 Lead. Cas., Eq., 708; Baker vs. Whiting, 3 Sum., 482; Ryan vs. Dox, 34 N. Y., 307.) If my impression is correct upon this point, then the demurrer is not well taken upon the second one. If, notwithstanding the deed from the sheriff to the defendant, he is only the trustee of the estate, Rachel Dove was the owner of the premises in equity and could convey the trust estate—the beneficial interest—to the complainant. (Baker vs. Whiting, supra.) And such a conveyance passes an interest in the property, and not a mere right of suit."

The defendant had leave to answer, the court saying, "It is to be understood that this opinion is expressed subject to correction on the final hearing, when the questions argued upon this demurrer may be considered in the light of the pleadings and proofs in the case."

The answer of the defendant admits that he was attorney for Bethuel Dove prior to the execution of the mortgage, but denies that he acted as such attorney in the matter of this loan and mortgage, or that he advised the same, or had any knowledge or information concerning the same
71 until long after they were made. It denies that the defendant was
employed by Bethuel and Rachel Dove to defend the suit to enforce the lien of the mortgage, but admits that he was so employed by Bethuel, and that to gain time for him he interposed a demurrer to the bill, which was overruled. It denies that the defendant informed or promised Rachel Dove that he would bid in the premises for her at the sheriff's sale, or that there was any understanding to that effect, but alleges that the Doves admitted their inability to hold the land, and asked him to buy for himself. It denies that the premises were worth $4,000 in gold coin, and alleges that they were not worth more than $1,225, without stating in what kind of money. It alleges that the sale of the premises was made on March 5, 1864, after being twice delayed for want of bidders, and that the sheriff's deed to the defendant was executed on April 26, 1864. It denies any information as to the value of currency at the date

of the sale, but alleges that Bethuel and Rachel Dove thereby obtained a credit on their debt to the county of $1,177.50, that being the amount for which the property was sold, less the costs. It denies that the defendant ever gave Rachel Dove to understand that she could redeem the land by the payment of $612.50 in gold coin, or that she paid him $200 in pursuance thereof, but admits that in the summer of 1864, at the request of Bethuel Dove, he agreed with him that if he would repay the defendant the purchase money, with interest, within a year from the date of the sheriff's sale, he would sell said Dove the premises upon those terms, and thereupon said Dove paid him $200 in gold coin upon said bargain, it being then and there further agreed between the parties that in case the balance of said purchase money was not paid within the time specified that the said $200 was to be applied as rent money for the use of said land; that within the first year said Dove occupied the premises, under said agreement, he cut and sold therefrom $400 worth of timber, and because defendant remonstrated with him for so doing he left the place and rented the same to O. H. Smith, aforesaid, but retained the possession of 30 acres thereof, which he "cropped the second year" against the remonstrance of the defendant. It denies that the defendant procured Smith to surrender the possession of the premises to him, but alleges that he received such possession from Moses Clark, the subtenant of Smith, on October 31, 1865; and also that said Rachel ever demanded the possession of the premises from the defendant, or an account of the rents and profits thereof. It denies that said Rachel ever conveyed her interest in the premises to the complainant for "a valuable, or any, consideration," or that the complainant is, in good faith, the lawful owner thereof, or that since said sheriff's sale she was ever the owner in equity or otherwise of said land, or any part thereof.

It alleges that in 1864 the premises were worth $200 a year, but that since 1865 the defendant has expended $480 in clearing and breaking 150 acres thereof, $540 for post and plank fence, and $400 for other fencing thereon, and $300 for building a barn and repairing a dwelling thereon, since when the value of the premises has been $300 a year, and that he has paid taxes upon the property to the amount of $200; that the contract aforesaid for the sale of the premises to Bethuel Dove was not in writing, and therefore void, and that more than six years have elapsed since the expiration of said agreement.

A general replication was filed to the answer. The evidence of a number of witnesses, including that of the defendant and Bethuel and Rachel Dove, was taken before the examiner and read on the hearing.

Upon the evidence, including the answer of the defendant, the following facts are satisfactorily established: That on September 18, 1874, the register and receiver of the proper land office issued a certificate, under section 7 of the act of September 27, 1850, aforesaid, from which it appears that the premises in controversy are the wife's half of the donation of Bethuel and Rachel Dove, granted to them by section 4 of the act aforesaid, on account of the husband's settlement and occupation thereon, commencing on December 1, 1868. That for some time prior to 1858, and up to 1865, the defendant was the general attorney and trusted adviser of Bethuel Dove and his wife; that in 1858 one William Griswold, after serious litigation, obtained a judgment against Bethuel Dove for over $8,000, in which litigation the defendant acted as the attorney of said Dove, and as such procured one J. B. V. Butler, also a
72 friend and client of his, to sign an undertaking for an appeal from the judgment of said district court to the supreme court of

the Territory, by which undertaking the parties thereto became bound to pay said judgment if affirmed, whereas said Butler at the time of signing said undertaking understood from the defendant that it was for the costs of the appeal only; that said judgment was affirmed and all the property of said Dove liable to execution, consisting of the north half of said donation and other lands, were sold to satisfy the same, and that in March, 1859, there was still due upon said judgment the sum of about $4,000 for which said Butler was liable as a defendant therein, but which was afterwards paid by said Bethuel; that on March 2, 1859, said Bethuel and Rachel executed a mortgage upon the premises in controversy to the treasurer of Polk County, to secure the payment of the sum of $1,550 then borrowed by said Bethuel from the school fund of said county, and payable three years thereafter, with interest at one per centum per month, to apply upon said judgment and so far relieve said Butler from his liability thereon, and that the defendant advised said loan and mortgage and was instrumental in procuring the former and inducing said Rachel to execute said mortgage, and received some $1,000 thereof from said Bethuel and Rachel to apply upon said judgment; that after said debt became due suit was commenced by the treasurer of said county in the circuit court thereof to recover the same and enforce the lien of said mortgage, to which suit said Bethuel and Rachel were parties defendant, and the defendant appeared therein as their attorney and made a defence thereto by demurrer, and on November 18, 1863, a decree was made therein that the plaintiff recover $2,052.75 and costs, and that the premises in controversy be sold as upon an execution at law to satisfy the same; that upon March 5, 1864, the said premises were so sold and bid in by the defendant for the sum of $1,125 in currency, the sale having been twice postponed in the mean time "for want of bidders and other sufficient causes," which sale was confirmed by said court on April 26, 1864, and a deed of the premises executed by the sheriff to the defendant on the same day; that at the date of such sale the defendant was the attorney of said Bethuel and Rachel in said matter, and, moreover, in making such purchase and receiving said conveyance was acting on behalf of said Doves in pursuance of an understanding between himself and them whereby the defendant was to bid in said premises at the sale in case they went low enough, as was expected, for the benefit of said Rachel, who was to redeem the same as soon as she could, in a reasonable time, and thereby secure a home for herself and husband in their poverty and old age, and that said Bethuel and Rachel relied upon said understanding, and therefore took no other steps or means to secure the property or redeem it within the time allowed by statute, as they might and would have otherwise done, and that on July 26, 1864, said Bethuel in pursuance of said understanding paid the defendant for said Rachel $200 in gold coin, for which he gave the following acknowledgement in writing:

"Received of B. Dove two hundred dollars to be applied on purchase of land purchased by me at sheriff's sale; the land known as Mrs. Dove half of donation land claim. July 26, 1864. (Signed) B. Hayden." But that the defendant afterward, by prohibiting said Bethuel from cutting and selling saw-logs from the premises and by procuring the tenant of the Doves—O. H. Smith, to whom the farm was rented in the fall of 1864, when Mr. Dove took up a homestead upon an island near by, where he has since lived—to pay him the rent due them, and finally in the fall of 1865 to surrender the premises to him, hindered and prevented said Bethuel and Rachel from

obtaining and acquiring the money wherewith to complete said redemption as per the agreement and understanding aforesaid;
73 that said Bethuel and Rachel are illiterate persons, not being able to read or write, and ever since the loss of the premises have been poor and without means to prosecute a suit for the same, while the defendant, by his position and influence in the county, has made it difficult, if not impossible, for them to assert their rights in the local tribunals with effect; that in September, 1874, said Rachel commenced a suit against the defendant in the circuit court of Polk County to recover the premises, but the same was afterward dismissed by her, and the premises, on April 7, 1875, as aforesaid, conveyed to the plaintiff, her son-in-law, for a valuable consideration, with the expectation and understanding that the plaintiff would bring a suit in this court to recover the premises, and such plaintiff thereby became and now is the owner of whatever right and interest therein the Doves then had; that at the date of the purchase of the premises by the defendant, March 5, 1864, the currency or U. S. legal-tenders paid by him was only worth in gold coin 65 cents on the dollar, $796.25, and that the premises were then worth not less than $2,000 in gold coin, and probably $3,000, and are now worth, exclusive of improvements, not less than $10,000; that the defendant was allowed to purchase the property for a sum so far below its real value because he was well known in the community as the attorney and friend of the Doves, and was very naturally understood to be acting in their behalf; and that the sum due the defendant in coin, on account of this transaction, on January 1, 1879, is as follows: Paid on land March 5, 1864, $796.25; interest thereon at ten per centum for 14 years, 9 months, and 25 days, $1,179.97; taxes paid on land, $200; present value of permanent improvements placed thereon, $1,000; total, $3,176.22; and that he is chargeable thereon as follows: Rent of premises from January 1, 1866, to January 1, 1879, 13 years, at $250 a year, $3,250; interest thereon, at rate aforesaid, $1,950; cash received July 26, 1864, $200; interest on the same, at the rate aforesaid, for 14 years and 5 months, $280.33; total, $5,680.33; balance against defendant, $2,504.11; from all of which it appears that the defendant has been long since repaid the money advanced to the Doves, and also his subsequent expenses in connection with his occupation of the premises.

The evidence is conflicting concerning some of these conclusions of fact, but the truth is generally apparent, notwithstanding. I do not propose to discuss it in detail, but there are one or two points that justify some special attention.

As to the circumstances concerning the preparation and execution of the mortgage, there is a direct conflict between the testimony of the Doves and that of the defendant and his witness, Reason R. Boothby. The contradiction can hardly be explained upon the theory of a failure of memory or an unintentional mistake, and therefore it almost necessarily involves wilful falsehood.

At the date of the transaction the defendant was living on his donation claim a few miles north of the Doves, while Boothby lived at Eola, about half way between them.

The Doves swear unqualifiedly that Hayden came to their house and prepared the mortgage there, using Ford's notes of the claim survey which they had in describing the premises, and left it with them saying he would send Boothby, a justice of the peace, down to take their acknowledgment; that Boothby came down the next day or two, when they executed and acknowledged the instrument.

On the contrary, Hayden swears both in his answer and testimony that he never wrote a line of the mortgage and don't know who did; that he never advised it or knew anything about it until some time after the execution. Boothby testifies that he wrote the mortgage, including the names of the mortgagors thereto, Bethuel and Rachel
74 Dove; in short, that he wrote every word of the instrument, except the names of the attesting witnesses, George Bolter and Theodore Ingalls.

The Doves, although not parties in interest, are not disinterested witnesses by any means, while the defendant is deeply interested in the result in both property and character. Boothby does not appear to be a person of any particular character or standing. During the past 20 years he appears to have lived from place to place in Oregon and Washington, for the most part east of the Cascades, and is a painter by trade.

A very satisfactory solution of this problem is furnished by an inspection and comparison of the writings on the mortgage with one another, and with that on the receipt of July 26, 1864; and also the signatures of the defendant and said Boothby to their evidence given before the examiner in this cause.

The mortgage bears upon its face indubitable evidence that Boothby's story is untrue; that he never wrote a word of the mortgage except the certificate of acknowledgment and his signature thereto as an attesting witness. In the first place Boothby's story and that of the defendant do not agree, for while the latter says he knew nothing about the making of the mortgage, the former said he went to Dove's to attend to this business at the request of the defendant, who then furnished him with a blank form upon which to write the mortgage and prepared a description of the premises.

The mortgage is upon a printed form of a deed of bargain and sale. The body of it contains 22 lines, which are written or mostly in writing, and the certificate 6 such lines, beside the signature of Boothby. The handwriting of the body of the instrument and the certificate are both unskilful, but quite uniform and marked in character and radically different. It is safe to say they were never written by the same person. The difference in the capital Rs, Bs, Ds, Ps, and figure 9s are very notable. But this is not all. In the body of the instrument the name Rachel is incorrectly spelled with an æ in the last syllable, while in the *the* certificate it is spelled in such syllable with an a only. Bethuel is spelled correctly in the body of the instrument, but in the certificate it is spelled without an *e* in the first syllable. It is also apparent that this name was first written in the certificate as B–*h*uel, and then before completion corrected into B–*th*uel, by making the loop of an *h* upon the m stroke or lower part of the first *h*, and thus converting the latter into a *t*. But the loop of the second *h* did not come down directly upon the *m* stroke of the first one, but at an angle, on the outside, thus leaving the process of emendation quite apparent.

The signatures of Bethuel and Rachel Dove to the mortgage were evidently written by the subscribing witness, George Bolter, who wrote a plain, bold, round hand, as unlike that in the body of the instrument or the certificate as light and darkness.

Again, the words in the condition of the mortgage "according to the tenor and effect of a certain promis'ory note," and the words "and fifty" in the premises of the deed immediately following the words "fifteen hundred," and the word "their" in the concluding clause are in a very different writing from the rest of the instrument. They are written in a skilled hand, with different ink, and upon comparison with the indorsement in red ink on the back of the instrument, showing when and where it was recorded, appear to be the writing of Mr. Lucian Heath, the then recorder of Polk County and secretary of state elect.

The second and third of these insertions merely supply manifest omissions, while the first only formally expresses what would otherwise be implied from what was already expressed. Before this interlineation the condition read: "This conveyance is intended as a mortgage to secure the payment of the sum of *fifteen hundred and fifty* dollars," all but the words in italics being printed, and continued: Thus "the note
75 executed by Bethuel Dove," etc., putting "the note" in apposition with "the sum of $1,560," which it represented. The interlineation, "according to the tenor," etc., was placed between the words "dollars" and "note" aforesaid, and the pen drawn through "the" before the word "note."

As it does not appear that Mr. Heath was present when the mortgage was executed, it is probable that these interlineations were made by him at the county-seat, Dallas, when the instrument was taken there by Dove, or other person, to obtain the money from the county treasurer, and was delivered to him for record.

Attention is called to these interlineations and insertions after the execution of the instrument not to suggest that any wrong was committed or intended thereby, but to show the incorrectness of Boothby's testimony, who deliberately and repeatedly swore that he wrote every written word in the instrument except the signatures of Bolter and Ingalls—the subscribing witnesses.

Neither is this all. Boothby swears in effect that he took a clean blank with him to Dove's on March 2, 1859, upon which he then and there wrote this mortgage, and it is very certain that this is not so. The mortgage reads, "This indenture, made this second day of March, A. D. 1859," the words, "second" and "March" and the figure "9" being in writing. But upon examination it plainly appears that in place of these words there was first written "twenty-sixth" and "February," the latter words being partially erased and the former written over and in place of them. Neither were the words "second" and "March" written by Boothby, but probably Bolter, who appears to have been the best penman that made a mark upon the paper, unless it was Heath, while the words "twenty-sixth" and "February" appear to have been written by the person who wrote the body of the instrument. The coincidences are most convincing, but one is almost demonstrative. The letter "x" in "twenty-sixth" is formed by two perpendicular curved lines with their convex sides approaching and connected by a hyphen or horizontal line, thus)-(. According to my observation, it is a very singular formation of the letter and an almost certain mark of identification. The only other written "x" in the instrument is found in the body of it, in the word "executed," and that is made in precisely the same way.

But the fact of the alteration of the date is a very significant one. It not only tends to prove that Boothby did not write the instrument as alleged, but also that it was drafted, as the Doves testify, by some one other than Boothby before the day of its execution, only the time was four days instead of one or two as they remember it.

The instrument having been drafted on February 26th, when the parties came to execute and acknowledge it before Boothby on March 2, it would naturally occur to some one that the date ought to be corrected, and so the words "twenty-sixth" and "February" were changed to "second" and "March," but not so as to prevent the paper from revealing to the microscope, and even the naked eye, the truth of the transaction.

From these facts and the striking similarity between the writing in the body of the mortgage and that in the receipt of July 26th, which is admitted to be the defendant's, as well as his signature to the examination, it is mortally certain that the defendant wrote the mortgage as the Doves testify.

The receipt is more than five years later in time than the mortgage, but making some allowance for the careless way in which the former is written, as compared with the later—it being necessary to write somewhat closely and small to get the matter in the spaces left in the blank—and for some freedom of hand acquired in the mean time, as well as the difference in pen, ink, and paper, the writings are very
like. All the peculiarities of style—and they are many and
76 marked—observable in the one are apparent in the other. The
capital Rs, Bs, Ps, and Ds are very notable instances. The terminal ds are uniformly made with an upward and outward curl from the o instead of the stem, while the initial and middle ones are just as constantly made with a stem, which is well detached from the body of the o, the latter being open. The figure 8 in the two writings is very singular and "they are as like as two black-eyed peas." The s, the ps, the words "Dove," "hundred," "land," "claim," in short, the whole face and expression of the one is exhibited in the other.

In this connection it may be also mentioned that at the taking of the evidence before the examiner this receipt was mislaid and supposed to be lost, and counsel for the plaintiff put in a paper which he testified was a true copy. The defendant being examined afterwards in his own behalf, and while it was thought the original was lost, swore unqualifiedly that it did not contain the final words, "the land known as Mrs. Dove half of donation land claim," and that it was for $200 "to be applied on land purchased by me at sheriff sale," omitting the words in italic, "to be applied on *purchase of* land purchased by me," etc. Subsequently the receipt was found and produced and read on the hearing.

Next, as to the agreement or understanding between the defendant and the Doves concerning the purchase and redemption of the premises. All the circumstances, and particularly the payment of the $200, and the receipt therefor, tend strongly to show that the defendant bid in the property at the sheriff's sale as the attorney and friend and for the benefit of the Doves, and that they were to remain in possession and have the benefit of the use and occupation of the place to enable them to repay him the purchase money with interest; and also that the defendant after a time conceived the design—lucri causa—to ignore his relation and understanding with the Doves, and claim the property as his own. The apparent excuse for this breach of faith was that these poor, old, unfortunate people would never be able to repay him, and to make sure of this he did what he could to prevent them from so doing by depriving them in the mean time of the use and possession of the property.

The defendant pretends that the agreement to redeem was made at the date of the receipt, and not before, and that he did not believe, at the time, that the Doves would be able to perform it, and therefore he made the further conditions that if the redemption was not completed within a year from the date, that is, by March 5th next following, the agreement should be at an end and the $200 then paid on it be retained by him as rent of the premises for such year. But with this statement the known and undisputed facts of the case are at variance. The re-

ceipt itself is directly opposed to it. If such was the agreement, why does it not appear in this writing, and especially why does it not contain some reference to the alleged conditions that the redemption was to be made within eight months from that date, and, if not, that the $200 then paid should be retained by the defendant as rent. The defendant is an attorney and a person of shrewdness and experience. These provisions are altogether in his favor, and it was his interest to preserve the evidence of them. While he was writing the memorandum a few words, more or less, would have expressed them. The Doves, according to his statement, had no rights in the premises, as against him, and so far as terms are concerned were at his mercy. But the language actually used in the writing is also contradictory of the defendant's statement. The receipt is not simply for $200 received by the defendant on account of land then sold the Doves or then purchased back by them from him. On the contrary, it is in terms and effect for $200, to be applied on purchase of Mrs. Dove's land, theretofore purchased by the defendant at sheriff's sale. To be applied on what purchase? Why, manifestly, the purchase made at the sheriff's
77 sale, thus suggesting distinctly what the Doves assert, that the
land, though purchased at such sale by the defendant in his own name, was, in fact, purchased for them and was in equity and good conscience their purchase. Upon no other theory of the facts can effect be given to this word "purchase" in the receipt or its use therein satisfactorily accounted for. Indeed, some such view of the matter must have suggested itself to the mind of the defendant, for he could not remember, when it was thought the receipt was lost, that it stated that the money was to be applied on the purchase of Mrs. Dove's land claim, and swore to the best of his recollection that these words were not in the receipt; and by way of giving emphasis and weight to his testimony in this respect swore that he had seen the receipt and scrutinized it closely since this matter was placed in the hands of counsel.

As to the value of currency at the date of the sheriff's sale, I have consulted the contemporaneous quotations of the price of gold and find that legal-tenders were then worth, in Portland, 65 cents on the dollar, which makes the amount advanced by the defendant, in gold, $796.25. The only testimony upon this point was that of the defendant and Dove, the former stating that they were worth about 75 cents and the latter 50; but he also states, what he was more likely to remember, that the amount to be repaid the defendant was about $700 in coin.

As to the value of the property in 1864, the testimony is very conflicting, the opinions varying from $700 to $4,000 in coin. Much of it is unsatisfactory, and some of it utterly incredible, as for instance, that it was not worth more than $2 per acre. In a country where land is the foundation of society, and agriculture the chief occupation of the people, a certain amount of knowledge upon this subject is common to most persons, and in considering this question it cannot be overlooked that this property is the half of a donation claim selected in 1848, and therefore probably choice land and favorably situated; that it lies very near the Wallamet River, within a few miles of the capital of the State; that with any kind of cultivation much of it will produce at least 20 bushels of wheat and 40 bushels of oats to an acre, one year with another, and that probably it has not since 1851 been held at a less value than $10 per acre, and under favorable circumstances might have been sold for that at most any time since. In arriving at this conclusion, weight has been given to the fact that in 1859 the property was accepted by the county treasurer of Polk County as sufficient security for $1,550, in coin, payable within three years with 12 per centum interest. From this fact it must have been valued at about $3,000, and I have no doubt but that was what it was then generally considered worth. And this shows that the inadequacy of the consideration advanced by the defendant was very marked, it being at most a little over one-third its real value, an inadequacy "so gross and manifest as to shock the conscience."

It has been suggested that the price paid, $1,225 in currency, was credited on the decree against the Doves at par, and therefore the defendant ought to be considered as having advanced that much for them in coin or its equivalent.

So far as Rachel Dove is concerned, a sufficient answer to this suggestion is found in the fact that the decree against her, so far as it was in personam and for money, was void. She was not indebted to the county. She did not join with her husband in the note for the loan, and if she had, being a married woman, the act would have been a nullity. (Norton vs. Mader, 4 Sawyer, 620; Dick vs. Hamilton, 1 Deady, 338.) By the mortgage she pledged her property for her husband's debt, and by its sale on the decree it was discharged from the lien.

The parties seem to have acted upon the theory that the husband had no interest in the wife's land. But this was a mistake. Bethuel Dove was seized of an estate for his life in the donation of his wife by vir-
78 tue of the marriage. (Starr vs. Hamilton, 1 Deady, 372; Wythe vs. Smith, 4 Sawyer, 19.) But even as to the husband, if the defendant acted for him in making the purchase, the advantage, if any, accrued to the former and not the latter. Between them, the question is, not what effect did the payment of the currency have upon the decree, but what did it cost the defendant? What did he advance? (McDowell vs. Milroy, 69 Ill., 500.) Upon this state of facts, and leaving out of view for the present that the defendant was also the attorney of the Doves at the date of this transaction, the law implies a trust between the defendant and them. His conduct being inequitable and unjust, and involving a gross breach of the special trust and confidence reposed in him by the Doves to their serious injury and his corresponding advantage, equity will treat him as a trustee of the property thus wrongfully acquired, and hold him liable accordingly. (1 Perry on Trusts, secs. 166, 168; 2 Sto. Eq., secs. 1254, 1261, 1265; 3 Lead. Cas. Eq., 139; Gaines vs. Chew, 2 How., 649.) This is a case of constructive trust, a trust arising out of the misconduct of the defendant, and does not depend upon the existence of a writing. It is without the statute of frauds, and the facts constituting it may be shown by parol. (1 Perry on Trusts, sec. 85; 2 Sto. Eq., sec. 1531; 2 Green Ev., sec. 266; Jenkins vs. Eldridge, 3 Sto., 286.) This being so, there is no doubt but that the Doves had an interest in the premises at the date of their conveyance to the plaintiff. In addition to the authority cited on the hearing of the demurrer upon this point, reference is made to Perry on Trusts, sec. 227, where it is said, "The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised. In the view of a court of equity, he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee."

But it is contended for the defendant that this suit is barred by the lapse of time; that the plaintiff, or those under whom he claims, have been guilty of laches—have slept upon their rights.

In the consideration of purely equitable rights and titles, courts of equity act in anology to the statute of limitations, but are not bound by it. As was said in this court in Hall vs. Russel, (4 Saw., 515,) "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So, in cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy to force upon the defendant the character of a trustee, courts will apply the same limitation as provided for actions at law;" citing Elmendorf vs. Taylor, (10 Whea., 176;) Miller vs. McIntire, (6 Pet., 66;) Beaubien vs. Beaubien, (23 How., 207;) to which may be added Wisner vs. Barnett, (4 W. C. C., 638;) Kane vs. Bloodgood, (7 John., Ch. 110,) and Michond vs. Girod, (4 How., 560.) Apply this rule to this case, and this suit may be maintained at any time within 20 years from the fall of 1865, the time when the defendant finally repudiated the arrangement with the Doves and wrongfully took possession of the premises, that being the period limited by statute for the commencement of an action at law therefor.

But where the trust is constructive and also arises out of the fraud of the defendant, there does not appear to be any fixed rule upon the subject. The matter is left to the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust when the demand is stale or where there has been long acquiescence in the wrong. (1 Perry on Trusts, sec. 228.)

79 Periods ranging from 50 to 17 years have been held to be a bar and under other circumstances a delay of from 11 to 18 years has been held to be no bar. (Perry, supra, sec. 229.) In Michond vs. Girod, (4 How, 561,) where the matter was thoroughly examined, Mr. Justice Wayne says:

"Within what time a constructive trust will be barred must depend upon the circumstances of the case. (Boone vs. Chiles, 10 Pet., 178.) There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud we believe no case can be found in the books in which a court of equity has re'used to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within 30 years after it has been discovered or becomes known to the party whose rights are affected by it."

This suit was commenced within eleven years, and the one in Polk County within nine years from the time the defendant took possession of the premises and disavowed the understanding and obligation under which he acquired the legal title, so that in any view of the matter there is no ground on which to rest a claim that this suit is barred by lapse of time or that the demand is stale or the wrong long acquiesced in. Indeed, considering the circumstance of the case and the unequal condition of the parties, the court would not be justified in refusing relief upon the case made, if twenty years had elapsed from the commission of the wrong.

But the decision of this case can be put upon higher and safer ground than the contracts and understandings of the parties, which are liable to both misrepresentation and misapprehension.

If the defendant was the attorney of the Doves at the time he bid in this property, he must be considered as acting for them, and he is liable to them therefor as their trustee, unless he can show satisfactorily that he purchased for himself with his clients' consent, and that the transaction was every respect fair and not to their disadvantage. The presumption is against him and the burden of proof is upon him; and if his interest as a purchaser may conflict with his duty as an attorney, the sale will be held void or the attorney charged as a trustee, at the option of the client. This rule is alike necessary to preserve the dignity and integrity of the legal profession and to protect the interests of a dependent and confiding clientage; and in the enforcement of it courts will not hesitate because the injury to the client does not fully appear or a positive intention on the part of the attorney to gain an advantage is not shown.

This statement of the law will be found fully supported by the following authorities, some of which go even beyond it, and hold that a purchase by an attorney of the subject of litigation cannot be maintained against the client under any circumstances:

1 Perry on Trusts, sec. 166; Case vs. Carrol, 35 N. Y., 388; Harper vs. Perry, 28 Iowa, 60; 1 Sto. Eq., secs. 312–13; Berrien vs. McLane, 1 Hoff., ch. 423; Cutts vs. Salmon, 5 Eng. L. & E., 95; S. C., 12 Eng. L. & E., 317; Ward vs. Carter, 1 Eng. Eq. Cas., 26; De Row vs. Fay, 3 ed., ch. 389; S. C., 4 ed., ch. 44; Trotter vs. Smith, 59 Ill., 244; Howell vs. Baker, 4 John, ch. 120; Hess vs. Voss, 52 Ill., 481; Wade vs. Pettibone, 11 Ohio, 60; Nesbitt vs. Lockman, 34 N. Y., 169; McDowell vs. Milroy, 69 Ill., 500; Hawley vs. Cramen, 4 Cow., 730; 1 Lead, Cas. Eq., 203; Evans vs. Ellis, 5 Denio, 643; Weeks on Attorneys, sec. 273 et seq.

The already great length of this opinion precludes any citation from these authorities, but the following paragraph from Case vs. Carroll, supra, is so exactly in point and so sound doctrine and clear in expression that it may be cited notwithstanding:

"It is a settled principle of equity that no person who is placed in
the situation of trust or confidence in reference to the subject of the
sale can be a purchaser of the property on his own account. And this
principle is not confined to a particular class of persons, such as
80 guardians, trustees, or solicitors, but it is a rule of universal ap-
plication to all persons coming within its principle, which is,
that no party can be permitted to purchase an interest when he has a
duty to perform inconsistent with the character of a purchaser."

But it is contended that the defendant was not the attorney of the Doves at the time of the purchase. It is admitted, however, that he was the general attorney of the husband, and it is not seriously contended that he was not such attorney for the wife also, through the agency of the husband, so far as she needed one. It is also admitted that he was the husband's attorney in the foreclosure suit, and finally upon the hearing the quibble that he was not the wife's attorney also in such suit was frankly abandoned. And this accords with the record which states unequivocally that he appeared for both, though the demurrer filed by him, or the transcript of it, states that "the above-named defendant"—in the singular—comes by B. Hayden, etc. But who is "the above-named defendant?" The reference is to the title of the cause in the beginning of the demurrer, and that reads, "J. Emmons, treas. of Polk County, vs. Bethuel and Rachel Dove, def'ts," so that if there is any ground for saying that this demurrer was made by the defendant for either of them rather than both, it is the wife, who is expressly named in full, and who was the principal party in interest. But the omission of the s from the word defendant in the body of the demurrer is undoubtedly a mere clerical misprision and unworthy of serious contention or further consideration.

But it is claimed that the defendant ceased to be the attorney of the Doves from and after the date of the decree of sale in the foreclosure suit, or at most at the expiration of 60 days thereafter—the time then allowed for an appeal to the supreme court.

This sale, being made in a suit in equity, was a judicial one, and so in effect are all sales made upon execution in this State—that is, it was not made absolutely, but subject to the approval of the court, which might upon the objection of the defendant set it aside if it appeared that there were "substantial irregularities in the proceedings" concerning the same, to his probable loss or injury. (Or. Civ. Code, secs. 293, 413.) If, then, the relation between the defendant and the Doves of attorney and client had not ceased before this sale, the defendant could not become a purchaser thereat on his own account without raising a conflict between his duty and his interest. It was his duty to examine the circumstances of this sale, and if he found good cause, to object to its confirmation. The property was sold for not more than one-third its value. There is satisfactory testimony in the case that a neighbor intended to make the property bring at least the amount of the decree and costs, but learning that the defendant was going to bid for Mrs. Dove, and having sympathy for her, he generously forbore. But this was an irregularity which ought to have avoided the sale. The loss was a direct injury to Dove, who was left personally liable for so much of the decree as the sale of property ought to have satisfied but did not. But the defendant, as he was situated, could not or would not bring this matter before the court, because if he purchased for Dove, as was the understanding, his clients were satisfied, while if he purchased for himself, as he now claims, his interest would prevent it.

How or why the defendant ceased to be the attorney of the Doves before this sale is not shown, nor can it be. It is not claimed that there was any change of attorney or any agreement or understanding that his services were to stop short of the final determination of the matter, which was not the mere entry of the order of sale, but the final confirmation.

81 By the law of this State an attorney has authority to bind his client in any of the proceedings in a suit by an agreement. (Civ Code, sec. 1007.) And he may be changed before the final determination thereof by consent, of record, or the order of the court. (Id., sec. 1010.)

As has been shown, the final determination of the proceeding in question was the order confirming the sale. It is not pretended that there was any change of attorney between the order and confirmation of sale, as provided by statute or anywise.

Still it is insisted that in some undefined and occult way the defendant dropped out of the case before the sale, and was thereafter a stranger to the proceeding. Suppose the defendant had not purchased and had signed a stipulation consenting to a resale or had appeared in court and objected to the sale, would it have been necessary to enter his appearance anew as upon a first retainer, or would the court or opposing counsel have presumed or thought of asking for his authority to appear in the proceeding for the confirmation of the sale, in the suit in which he had appeared and acted as the defendant's attorney in the preparation and hearing of the cause?

It seems to me that the matter is too plain for argument. The defendant was the attorney of the Doves when he made the purchase, and in so doing, if he purchased for himself, as he now claims, he put his duty to them in conflict with his interest as such purchaser, to the manifest injury of his clients, and therefore they have a right to treat the sale as void, or to hold him to account as their trustee. If, on the other hand, he purchased it for them, as I find from the evidence he did, then of course he is their agent and trustee, and bound to account to them as such.

The conclusions he here stated have not been lightly or hastily reached. But they are the result of a thorough examination of the case, and a full and careful consideration of the questions involved in it, after able and instructive arguments by the learned counsel who appeared for the parties—particularly for the defendant. I now announce them with reasonable confidence in their conformity to the law and justice of the case, and with the comfortable assurance that if they are otherwise the defendant can appeal to so exalted a tribunal as the Supreme Court of the United States for their correction.

The decree of the court will be, that the defendant, within sixty days, convey the premises to the plaintiff by a good and sufficient deed, with proper covenants against his own acts, to be prepared and settled before the master of this court, and at the same time deliver possession of the premises, and that defendant within the same time pay the plaintiff his costs in this suit expended, and that in default thereof execution issue therefor.

George W. Lawson, H. Y. Thompson and Claude Thayer, for the plaintiffs.

E. C. Bronnaugh and William H. Effinger, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

(Endorsed:) Filed January 20th, 1879. R. H. Lawson, clerk.

82 And afterwards, to wit, on the 24 day of January, 1879, there was duly filed in said court by complainant, his bill of costs and disbursements in words and figures as follows, to wit:

Complainant's bill of disbursements.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING
vs.
BENJAMIN HAYDEN.

Statement of costs & disbursements claimed by complainant in the above-entitled suit.

Clerk's fees	$47 50
Examiner's fees	63 00
Trial fees	47 30
Docket "	20 00
Deposition of Eliz. Manning	8 60

Witness fees as follows:

Henry Clark, Marion County,	1 day's	120 miles		$7 50
Moses Clark, Benton	" 2 "	200 "		$13 00

John Springer, Polk	"	2	"	114	"	$8 70
E. P. Dove, "	"	2	"	114	"	$8 70
Rachel Dove, "	"	2	"	114	"	$8 70
B. Dove, "	"	2	"	114	"	$8 70
M. Kennedy, Salem	"	2	"	100	"	$8 00
P. C. Sullivan, "	"	1	"	100	"	$6 30
						256 20

83 The aboved-named witnesses were examined at Portland, in said district.

The following-named witnesses were examined at Salem, in said district aforesaid:

Bro't over				$256 20
E. P. Dove,	Polk County,	2 days	14 miles	$3 70
L. C. Berry	" "	2 "	10 "	$3 50
B. Dove	" "	1 "	14 "	$2 20
William Jones	" "	2 "	10 "	$3 50
M. Kennedy, Salem		1 "	1 "	$1 55
Jasper Kennedy,	Polk County,	1 "	1 "	$1 55
John Osborn	" "	1 "	16 "	$2 30
T. A. Patterson	" "	1 "	16 "	$2 30
S. Beckett	" "	2 "	10 "	$3 50
Paid to Mr. W. B. Gilbert, examiner, as travelling expenses to Salem to take depositions in suit				$7 00
Paid E. P. Dove for subpœn'ing 8 of above witnesses, 2 day and 40 miles travel				6 40
Lawrence Perry for subpœn'ing 8 witnesses, 1 day & six miles travel				4 36
Notary fees, affidavit to this bill				50
				298 56

DISTRICT OF OREGON, *ss:*

I, B. Dove, being duly sworn, say *says* that I am the agent of the complainant herein; that the disbursements set forth have been 84 necessarily incurred in the prosecution of this suit, and that the complainant is entitled to recover the same from the def't.

his
B. + DOVE.
mark.

Subscribed and sworn to before me this 24 day January, 1879.
[NOTARIeL SEAL.]
C. A. SWEEK,
Notary Public for Oregon.

(Endorsed:) Filed January 24th, 1879. R. H. Lawson, clerk.

85 And afterwards, to wit, on the 28th day of January, 1879, there was duly filed in said court a notice of appeal by said defendant in words and figures as follows, to wit:

Notice of appeal.

CHARLES MANNING, COMPLAINANT AND RESPONDENT,
vs.
BENJ. HAYDEN, DEFENDANT AND APPELLANT.

To the honorable the Supreme Court of the United States:

The appeal of Benjamin Hayden, the above-named defendant and appellant, respectfully showeth—

That upon the 12th day of May, A. D. 1876, the above-named complainant filed his bill in the circuit court of the United States for the district of Oregon against the above-named defendant and appellant, alleging that one Bethuel Dove and wife had donated and granted to them by the act of Congress of Sep. 27, 1850, commonly called the "donation law," a tract of land containing $638\frac{23}{100}$ acres, known as claim No. 54, being parts of sections 34 and 35 in township 7 south, range 4 west, in Polk County, in the State of Oregon, the north half of said tract to the said Bethuel Dove, and the south half thereof to Rachel Dove, his wife; that on March 2d, 1859, said Dove and wife ex-
86 ecuted a mortgage of the said south half of said land to W. P.
Lewis, county treasurer of Polk County, to secure the sum of about $1,500.00, that on or about the 18th day of November, 1863, said mortgage was foreclosed by decree of the circuit court of the State of Oregon, for Polk County aforesaid; that said land was sold by the sheriff as ordered in said decree; That the defendant became the purchaser thereof at said sale for $1,225.00 currency, then worth in gold coin $612.50, and has ever since been in possession thereof, claiming to own it as his own property; that defendant is and was at and prior to said sale and foreclosure an attorney at law and as such drafted said mortgage for Dove & wife, and appeared as counsel for them in the defence of said foreclosure suit, and prior to said sale promised to purchase said property for their use and benefit, and to reconvey the same to them on request and repayment of the amount so bid and paid by him for said property; that on or about April 7, 1875, said Dove and wife conveyed said premises to complainant; that at said last-mentioned date the rents and profits from said land had more than repaid defendant his said purchase money and interest; and praying that defendant be decreed to hold the legal title thereof in trust for complainant
87 and be decreed to convey said premises to complainant.

And the defendant, by his answer, while admitting the fact of the donation of said land to Rachael Dove by the government, and the execution by Dove and wife of said mortgage and the foreclosure thereof, and the sale of said land and the purchase thereof by defendant at said foreclosure sale, and that he was then, and ever since has been, an attorney at law, denies, however, that he drafted said mortgage, or was in any way connected with the execution thereof; admits that he did appear as attorney for said Bethuel Dove, and filed a demurrer on his behalf to the complaint in said foreclosure suit, which demurrer was by the court overruled, and defendants, having no defense to the merits upon the issues of fact, did not answer, and the decree of foreclosure was entered against them for want of answer; that the land was advertised for sale by the sheriff to satisfy said decree, and the sale twice postponed for want of bidders, and at the third time sold to defendant, he being the highest and best bidder therefor, and having

borrowed the money on his own account with which to make said
88 purchase; and denying that he ever agreed or promised to pur-
chase in said land for Dove or his wife, or that anything was
ever said between him and them, or him and either of them, or any
other person, about his purchasing in said property for Dove or wife,
or about reconveying it to them, or either of them, prior to said sheriff's
sale, nor for several months afterward; and by the reply in which suit
issue was joined to said answer by denial thereof; that on the 20th day
of January, 1879, a final decree was made and pronounced in the cause,
wherein it was in substance adjudged and decreed that defendant in
purchasing said south half of said donation claim at said foreclosure
sale on March 5th, 1864, as the agent and attorney of said Dove and
wife, for the sum of $1,225.00, then equivalent to 796.25 in gold, and
took the conveyance from the sheriff on April 26, 1864, in his own
name, but in fact as trustee for said Bethuel and Rachael Dove in trust
that he would permit them to remain in possession thereof, and would
reconvey the same to them or their assigns on repayment to him of
said sum of $796.25 and interest, and that defendant wrongfully took
and holds possession of said land; that the rents and profits since ac-
crued more than equal said purchase money and interest, taxes
89 paid, and improvements made on the land by defendant; that
complainant, on April 7, 1875, succeeded to all the rights and in-
terests of Dove and wife in said land by deed from them to him of that
date, and that defendant do, within sixty days from the date of said
decree, convey to complainant said land and deliver to him the posses-
sion thereof, and pay to him the costs and disbursements of this suit,
and that in default thereof execution issue therefor.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said bill, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated January 28th, A. D. 1879.

J. N. DOLPH,
Solicitor for Appellant.

90 DISTRICT OF OREGON, *ss:*

I, W. Lair Hill, one of the solicitors of record of the within-named Charles Manning, and also an attorney of the Supreme Court of the United States, do hereby accept and admit due service of the within notice of appeal, by the delivery to me, at Portland, Oregon, on this 29th day of August, A. D. 1879, of a true copy of the same.

W. LAIR HILL,
Solicitor for Complainant.

We hereby acknowledge and admit due service of the within notice of appeal on us this 28th day of January, A. D. 1879.

HILL, DURHAM & THOMPSON,
Of Solicitors for Complainant.

(Endorsed:) Filed Jan. 28, 1879. R. H. Lamson, clerk.

91 And afterwards, to wit, on the 28th day of January, 1879, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

Bond on appeal.

Supreme Court of the United States.

BENJAMIN HAYDEN, APPELLANT, }
vs.
CHARLES MANNING, RESPONDENT. }

Know all men by these presents that we, Benjamin Hayden, A. Bush, and R. H. Dearborn, of Salem, Marion County, Oregon, are held and firmly bound unto Charles Manning, a citizen of the State of California, and the complainant and respondent herein, in the sum of one thousand five hundred dollars, to be paid to the said Charles Manning, his executors or administrators, which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this twenty-fifth day of January, A. D. 1879.

Whereas the above-named Benjamin Hayden hath taken an appeal
to the Supreme Court of the United States to reverse the de-
92 cree rendered in the above-entitled suit by the circuit court of
the United States for the district of Oregon, January, 1879:

Now, therefore, the condition of this obligation is such that if the above-named Benjamin Hayden shall prosecute his said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and value.

B. HAYDEN. [SEAL.]
A. BUSH. [SEAL.]
R. H. DEARBORN. [SEAL.]

Sealed and delivered in presence of—
J. H. ALBERT.
A. C. BREY.

STATE OF OREGON,
District of Oregon, County of Marion, ss:

We, A. Bush and R. H. Dearborn, of Salem, Oregon, sureties upon the foregoing obligations, being severally and duly sworn, say, and each for himself says, that I am a resident of Salem, Marion County, in the State of Oregon, and a freeholder of said county and State, and am worth the sum of one thousand five hundred dollars over and above my just debts and liabilities, and exclusive of property exempt
93 from execution.

A. BUSH.
R. H. DEARBORN.

Subscribed & sworn to before me this 25th day of January, A. D. 1879.

[SEAL.]

J. HALBERT,
Notary Public.

(Endorsed:) Filed Jan. 28, 1879. R. H. Lamson, clerk.

Examined and approved January 28, 1879.

DEADY, J.

94 And afterwards, to wit, on the 28th day of January, 1879, there was issued out of said court a citation, in words and figures as follows, to wit:

By the honorable M. P. Deady, one of the judges of the circuit court of the United States for the district of Oregon.

To CHARLES MANNING:

Whereas Benjamin Hayden has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Oregon, made in favor of you the said Charles Manning, and has filed the security required by law: You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 2d Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Portland, in the district of Oregon, in said circuit, the 28 day of January, A. D. 1879.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

95 DISTRICT OF OREGON, *ss:*

I, W. Lair Hill, one of the solicitors of record of the within-named Charles Manning, and also an attorney of the Supreme Court of the United States, do hereby accept and admit due service of the within citation by the delivery to me, at Portland, Oregon, on this 6th day of February, A. D. 1879, of a true copy of said citation.

W. LAIR HILL.

Due service of the within citation is hereby admitted and acknowledged by us, on behalf of the within-named respondent Charles Manning, on this 28th of January, A. D. 1879.

H. Y. THOMPSON,
Of Solicitors for Complainant.

(Indorsed:) No. 317. In the Supreme Court of the United States. Chas. Manning, compl't & respond't, vs. Benj. Hayden, defendant & appellant. Citation. Filed February 7th, 1879. R. H. Lamson, clerk.

96 And afterwards, to wit, on the 7th day of February, 1879, there was duly filed in said court an application by said complainant, which, with order thereon, in words and figures as follows, to wit:

Application under equity rule 8, to send original papers to Supreme Court.

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING
vs.
BENJAMIN HAYDEN.

To the honorable the judges of the above entitled court:

The petition of the plaintiff respectfully shows that in the consideration of the above-entitled cause, on appeal in the United States Supreme Court, the credibility of the witnesses for the respective parties herein, and the corresponding weight to be given to the testimony, depends largely upon an inspection or examination or comparison of certain original papers introduced in evidence in said cause, such as a certain receipt signed by def't Hayden, and a certain mortgage. Plaintiff would therefore respectfully request that the court make such order as it may decree proper in the matter of forwarding to the Supreme Court such papers (originals) as it may deem necessary or desirable, and especially said original receipt for $200 signed by said def't. and said original mortgage.

HILL, DURHAM AND THOMPSON,
Of Pl'ff's Solicitors.

(Endorsed:) Filed Feb. 7, 1879. R. H. Lamson, clerk, by Paul R. Deady, deputy.

97 *Order on above petition.*

In the circuit court of the United States for the district of Oregon.

CHARLES MANNING
vs. } No. 317. August 25, 1879.
BENJAMIN HAYDEN.

On hearing the above petition, it is ordered that the clerk of this court transmit to the Supreme Court the original mortgage executed by Bethuel and Rachel Dove to William P. Lewis, treasurer, on March 2, 1859, and the original receipt signed by B. Hayden, and dated July 26, 1864, said originals to be transmitted in addition to the transcript of the record sent to the Supreme Court on the appeal of said cause.

(Signed) DEADY, *J.*

98 *Deposition of Elizabeth Manning.*

UNITED STATES OF AMERICA,
State of California, County of Shasta:

I hereby certify that the foregoing deposition of Elizabeth Manning, a witness on behalf of the complainant in the suit of Charles Manning vs. Ben. Hayden, in the circuit court of the United States for the district of Oregon, in answer to the direct interrogatories and cross-interrogatories attached to the commission annexed hereto, and issued out of said court in said cause, and to me directed, was taken before me at my office, in Fall River Mills, Shasta County, State of California, between the hours of 10 a. m. and 3 p. m. on the 1st day of Feb., A. D. 1878, and reduced to writing by me. That before probeeding to the said examination the witness aforesaid was duly sworn by me to tell the truth, the whole truth, and nothing but the truth.

99 That said deposition or answers of the witness aforesaid to the said direct and cross-interrogatories were read over to said witness, pronounced correct, and then by her subscribed; that I then retained said testimony or deposition in my hands to forward by mail in a sealed envelope to R. H. Lamson, clerk of said U. S. circuit court for the district of Oregon, at Portland, in said State.

Witness my hand this 1st day of February, A. D. 1878.

M. P. ROSE,
Commissioner.

Fees, $1.25; paid by P. H. Manning, C.

100 STATE OF CALIFORNIA,
Shasta County, ss:

CHARLES MANNING, COMPLAINANT,
vs.
BEN. HAYDEN, DEFENDANT.

MRS. ELIZABETH MANNING, being duly , deposes as follows:

Direct interrogatories:

Int. 1st. Mary Elizabeth Manning; age, 30; residence, Shasta County, California; occupation, housekeeper.

Int. 2. I am.

Int. 3. I am a daughter.

Int. 4. I was living with him in the spring of 1864, in Polk County, Oregon.

Int. 5. I lived with Moses Clark, in Polk County, Oregon, about two weeks, in the spring of 1864.

Int. 6. I do.

Int. 7. He left a message. He said he had left a man in his place to bid the lands in for my mother.

101 Int. 8. I delivered it to my mother.

Int. 9. I heard a conversation between Mr. Hayden and my mother in June or July, 1864, in regard to her land, and in regard to money matters connected with it.

Int. 16. Mother to Mr. Hayden that she had some money for him to pay on her land. He, Hayden, said he was glad of it, as he wanted some money to buy some sheep to put on his ranch in the hills. Mother told Hayden at that time that if he had not promised her that she should have her land back again she would have never signed her right away. Hayden said the land had been hers and should be again, and that all that he wanted was his money back with interest.

Int. 11. He, Hayden, was her att'y in 1864. I heard him talk with mother about the land, so I inferred from the conversation between Hayden and my mother that he, Hayden was her att'y.

102 Int. 12. I think he, Hayden was her att'y in the foreclosure of the mortgage upon her lands from the fact that Hayden told her, my mother, he could not be there, but he had left a man to bid the lands in.

Int. 13. I don't think I know of anything more than what I have already stated.

(Witness desires to correct her answer to int. 5.)

It was in the spring of 1865 that I lived with Moses Clark. In 1864, I was living at home all the time.

MARY E. MANNING.

Subscribed and sworn to before me this 1st day of Feb., 1878.

M. P. ROSE, *Commissioner*.

103 STATE OF CALIFORNIA,
County of Shasta, ss:

CHARLES MANNING, COMPLAINANT,
vs.
BEN. HAYDEN, DEFENDANT.

ELIZABETH MANNING, being duly sworn, deposes as follows:

Cross-interrogatories:

Cross-int. 1. There was present my brothers John, Jack, Dave, and Dick Dove; also my sister, Kate Dove, still younger than myself.

Cross-int. 2. I was in my mother's house at the time, in Polk County, Oregon.

Cross-int. 3. I cannot remember the date, but I think it was in the early part of the years, as it was still raining & muddy. It was not long before the foreclosure of the mortgage.

Cross-int. 4. I never told any one except my mother.

Cross-int. 5. It occu'red in my mother's house, Polk County, Oregon, in the forepart of the day. There was no one else present except myself.

104 Cross-int. 6. I think it was in the afternoon.

Cross-int. 7. I judge from the conversations between Hayden and my mother that he was acting as her att'y prior to 1865.

Cross-int. 8. I heard Hayden say, or he told me, that he had left a man to bid in the land, and that he could not be there himself. I heard mother tell Hayden that she had some money for him to pay on her land. Hayden said he was glad of it as he wanted some money to buy some sheep to put on his ranch in the hills. There was no one present at the time of this conversation except myself. This conversation between Hayden and my mother occurred in June or July, 1864, in my mother's house in Polk County, Oregon.

Cross-int. 9. I only know it from conversations between Hayden and my mother.

Cross-int. 10. I don't know who wrote the mortgage, but mother signed it in the presence of Squire Boothby, in her house.

Cross-int. 11. My husband has, but I have not.

Cross-int. 12. My mother received a letter from G. W. Lawson, from Salem, Oregon, on that subject.

105 Cross-int. 13. I never have conversed with my husband in regard to what I would swear to in this matter.

Cross-int. 14. I don't remember how often we have conversed about the matter. Have spoken but very little about the matter at any time. I can't remember when we first conversed aboutthe matter..

Cross-int. 15. I don't remember what month nor what day.

Cross-int. 16. My husband did know of it.

MARY E. MANNING.

Subscribed and sworn to before me this 1st day of February, 1878.
M. P. ROSE, *Commissioner.*

That in 1864, in the summer, (the rec't is dated July 26, 1864,) at the house of her mother in Polk County, Ben. Hayden came there and told her mother, Rachel Dove, in her presence, that he had bid the place of' for her. It had been her farm and should be again. That he would make the right over to her, so that nobody should take it away from her. That all he wanted was his money back with interest. That
106 he was hard up, and if she could let him have any money now that he would be glad to get it. She told him that she had about $200, and would send it up to him as soon as Mr. Dove got home. She was then about 16 years old. Also that Ben. Hayden came to house about the time of the sale. The old folks were not at home, and Ben told her, Elizabeth, to tell her mother not to be uneasy about the sale of the place, as he had left a man there to bid it off for her. This some time early in the year; none but little children were present.

107 In the circuit court of the United States for the district of Oregon.

The president of the United States of America to M. P. Rose, justice of the peace, precint, Shasta County, California, greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you full power and authority diligently to examine Elizabeth Manning upon her corporal oath or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereto annexed, as witness on the part of the plaintiff in a certain cause now pending undetermined in the circuit court of the United States of America for the district of Oregon, wherein Charles Manning is plaintiff and Benjamin Hayden defendant; and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to the clerk of the above-entitled court at Portland, in the district of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Portland, in said district, this the 11th day of January, A. D.1878.

SEAL.] R. H. LAMSON, *Clerk.*

108 In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

To the above-named defendant and Messrs. Dolph, Bronaugh, Dolph & Simon, his attorneys.

You will please take notice that on Friday, the 11 day of January, 1878, at the hour of 10 o'clock a. m., the pl'ff will apply to the court above named for an order directing the clerk of said court to issue a commission authorizing some suitable person to be named therein to take the deposition of Elizabeth Manning, a witness for the said pl'ff, residing at the Fall River Mills, in Shasta County, in the State of California.

You will further take notice, that if said order be granted, then
109 on the said 11 day of January, 1878, at the hour of 10½ o'clock,
the pl'ff will apply to R. H. Lamson, clerk of said court, at his office in Portland, for the commission above named, with the interrogatories attached, which are this day filed with said clerk, and a copy of which are attached the copy of this notice for service upon you; at which said time and place you will please appear and make any objections you may have to said interrogatories, and file such cross-interrogatories as you wish propounded to said witness at her examination as a witness.

HILL, DURHAM & THOMPSON,
Of Solicitors for Pl'ff.

Due service of the within notice is hereby acknowledge', and a receipt of a copy thereof is admitted this 7th day of Jan., 1878.

E. C. BRONAUGH,
Of Att'y for Def't.

(Endorsed:) Filed Jan. 8, 1878. R. H. Lamson, clerk.

110 In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAIN'T,
vs.
BENJAMIN HAYDEN, DEFENDANT.

Interrogatories to be propounded to Elizabeth Manning, a witness on behalf of the complainant in the above-entitled cause.

Int. 1. State your name, age, residence, & occupation.

Int. 2. State whether or not you are the wife of Charles Manning, the complainant in this cause.

Int. 3. State what relation you are, if any, to Rachel Dove, of Polk County, Oregon.

Int. 4. If in answer to the last interrogatory you say that Rachel Dove is your mother, state whether or not you were living with her in Polk County, Oregon, in the spring of the year 1864.

111 Int. 5. State where and with whom you did reside during the early part of the year 1864.

Int. 6. Do you know Ben. Hayden, the defendant in this cause?

Int. 7. State whether or not the def't, said Hayden, left any word or message with you in the spring of 1864, or about that time, for your mother concerning her lands. If so, state fully what that word or message was.

Int. 8. State whether or not you delivered that message, and to whom.

Int. 9. State whether or not you heard a conversation between your mother and the def't Hayden, on or about July 26, 1864, in regard to her land claim, or in regard to money matters connected with it, or both.

Int. 10. If you did hear such a conversation between your mother and said Hayden, state what was said by them and by each

112 of them in that conversation. State fully.

Int. 11. Do you know whether said Hayden was att'y for your mother at any time in 1864, or about that time? If so, state what you know about it.

Int. 12. State what you know, if anything, as to the def't Hayden being att'y for your mother in the foreclosure of a mortgage upon her lands, given to secure money borrowed from the school fund. State fully.

Int. 13. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

G. W. LAWSON,
HILL DURHAM & THOMPSON,
THAYER & WILLIAMS,
Solicitors for Complainant.

113 Due service of the within interrogatories and a receipt of a copy thereof is hereby acknowledged this 7th day of Jan., 1878.

E. C. BRONAUGH,
Of Att'ys for Def't.

(Endorsed:) Filed Jan. 8, 1878. R. H. Lamson, clerk.

114 In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

The defendant above named objects to each and every of the direct interrogatories, numbered from No. 7 to No. 13 inclusive, propounded by complainant to Elizabeth Manning, on the ground that the evidence called for by each of said questions is incompetent and immaterial, and each of said interrogatories is leading & suggestive.

W. H. EFFINGER AND
E. C. BRONAUGH,
Sol. for Def't.

(The above objections are overruled this 11 day of January, 1878.—R. H. LAMSON, *Clerk*)

Pl'ff consents that the exception of def't to the above ruling be hereby noted.

G. H. DURHAM,
Of Sol. for Compl't.

(Endorsed:) Filed Jan. 11, 1878. R. H. Lamson, clerk.

115 In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BENJAMIN HAYDEN, DEFENDANT.

Cross-interrogatories to be propounded to Elizabeth Manning, a witness on behalf of the complainant in the above-entitled cause.

Cross-int. 1. If in answer to direct interrogatory 1 you say that said defendant Ben. Hayden left any word or message with you in the spring of 1864, or about that time, for your mother concerning her lands, state who else, if any one, was present beside yourself and said Hayden when said message was left with you.

Cross-int. 2. State where you were when said message was left with you.

116 Cross-int. 3. State in what month in the year 1864 & on what day of the month & week such message was left with you.

Cross-int. 4. State whether you ever told any one else besides your mother that such message had been left with you for her; and, if so, name all the persons whom you so told and the time or times when you so told such person or persons.

Cross-int. 5. If in answer to direct interrogatory 9 you say you heard any conversation between your mother and defendant Hayden on or about *the* July 26, 1864, in regard to her land claim or in regard to money matters connected with it, or both, state where said conversation occurred, and the time of day, when it occurred, and who else, if any one, was present at that time.

Cross-int. 6. If you say a message was left by the def't Hayden for your mother, in answer to direct interrogatory 7, state what time of the day it was, whether in the forenoon or afternoon, when such message was left with you.

117 Cross-int. 7. If you say def't Hayden ever acted as att'y for your mother prior to 1865, state what writing he did for her, or what other act or thing he did for her which enables you to conclude or leads you to suppose he was her att'y in the matter, or that he was acting as such.

Cross-int. 8. If you say you know or supposed him to be acting as her att'y in any matter or thing prior to 1865, from conversations between them, state what the conversation was, and the names of all persons who were present at the time, and when and where such conversation was had.

Cross-int. 9. If you say def't Hayden acted as att'y for your mother in the foreclosure of a mortgage upon her lands given to secure money borrowed from the school fund, state how you know it, what he did in connection therewith, and from whom you learned the facts.

118 Cross-int. 10. State whether you know who wrote that mortgage; and, if so, how you know it, and when and where it was written.

Cross-int. 11. State whether either you or your husband had been written to, or have received a letter or letters from any person or persons in regard to what your testimony would be in this case.

Cross-int. 12. If you have received any letter, or if your husband has, on that subject, from whom and when, and such letter a part of this deposition by annexing it hereto.

Cross-int. 13. How often have you conversed with your husband about what you would swear to in this matter, and when did you first tell him what you would so swear?

Cross-int. 14. How often have you conversed with your husband about the matter testified to by you in this deposition, and when did you first converse with him about these things or any of them?

119 Cross-int. 15. In what month and on what day of the month in the spring of 1864 did def't Hayden leave said message with you for your mother?

Cross-int. 16. State whether at the time the premises in controversy were conveyed by Bethuel & Rachel Dove to your husband, Charles Manning, he did not know of the dispute about the ownership of the land between the Doves and Hayden.

W. H. EFFINGER.
E. C. BRONAUGH,
Sol. for Deft.

(Endorsed:) Filed January 11, 1878. R. H. Lamson, clerk.

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120 In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT,
vs.
BEN. HAYDEN, DEFENDANT.

The complainant above named objects to each and every of the cross-interrogatories, numbered from No. 41 to No. 16 inclusive, propounded by deft. to Elizabeth Manning, on the ground that the evidence called for by each of said interrogatories is incompetent and immaterial, and not cross-examination.

G. W. LAWSON, THAYER & WILLIAMS & HILL,
DURHAM & THOMPSON, *Compl'ts' Sol.*

The above objections are overruled this 11 day of January, 1878.

R. H. LAMSON, *Clerk.*

Complainant by her att'y hereby excepts to the above ruling, Jan. 11, 1878.

G. H. DURHAM,
One of Compl'ts' Sol.

Deposition endorsed & Filed Jan. 11, 1878. R. H. Lamson, clerk.

121 In the circuit court of the United States for the district of Oregon.

CHARLES MANNING, COMPLAINANT
vs.
BENJAMIN HAYDEN, DEFENDANT.

Upon this 3d day of January, 1878, at my office in Portland in said district, before me, the examiner of said court, came the plaintiff by and the defendant in person and by E. C. Bronaugh, esq., his attorney, and thereupon depositions are taken and proceedings had in said cause as follows.

W. B. GILBERT, *Examiner.*

HENRY W. CLARK is called as a witness for complainant. Being duly sworn, he deposes as follows:

Ques. first. State your name, age, and place of residence.

Ans. 1. Henry W. Clark; aged fifty years; live in Marion County, Oregon; I am acquainted with the donation land claim of Rachael Dove in Polk County; my acquaintance commenced in the fall of 1852; 122 and again in the spring of 1853 I was there; I left the place in 1852 after staying on it some five or six weeks. If not mistaken in dates, I would say I had the place rented in 1865.

Ques. 2. Was the lease oral or written?

(Objected to as immaterial.)

Ans. 2. It was verbal.

Ques. 3. What was done with that lease by you, if anything?

(Objected to as immaterial and incompetent.)

Ans. 3. The place was lived on by my brother. I did not live on the place. I was interested in the lease of the farm. My brothers and my contract of lease was with O. H. Smith, of Polk County; we rented for one year; as to delivering up the place I can give no testimony. I can say this, that the rent of the place was paid to Judge Hayden.

Ques. 4. State what in your judgement and from your knowledge of the premises was the value of that tract of 320 acres in the spring of 1864 with its improvements.

(Objected to as incompetent, immaterial, and not the best evidence.)

Ans. 4. I would say that the 320 acres of land was worth $2,500 or $3,000.

123 Ques. 5. State as near as you know the quality of that land as to timber and prairie and the condition of its improvements.

(Objected to by defendant as incompetent and immaterial and not the best evidence.)

Ans. 5. I would say that about one-half is prairie. A portion of the prairie, the bottom land, was very excellant land at that time. It was bottom land of the Wallamet River on a slough from the river. The prairie land, about half of which was upland, was not so good.

Cross-examination:

If I am not mistaken my brother and I were to pay one-third rent. I cannot say how much it amounted to; it is too long ago. It was paid in grain. I can't recollect the value, or the price, or the quantity of the grain. That bottom land was that year getting quite foul with wild oats. I don't know as I can correctly state how much of the bottom land we had in cultivation that year, perhaps not more than forty acres in all, both bottom and upland. I don' rec*co*'lect who was cultivating
the other portion of the place that year. I can't say that I saw
124 rent paid to Judge Hayden, but that was the order, that it should
be paid to him. I left all the' things to my brother, as I lived some ten miles distant. I believe that about half of the prairie land is upland. I can't say how much of the upland was in cultivation that year.

Cross-int. 1. How many other farms do you know of being sold in that county that year?

(Objected to as immaterial.)

Ans. 1. I can't just call*ed* to mind any, but no doubt there were several.

I don't know how this land was sold when Judge Hayden bought, whether public or private sale. From my experience and observation, property sold at public sale under the ham'er certainly does not bring as good prices as property sold at private sale. It would be pretty hard to state how much of the place was under fence that year. The greater part of the 640 acres was under fence and I think all of that bottom land was enclosed in one field, including all the brush and timber land; about one-half of the 320 acres was wood land. There was a dwelling-house on the place but it was in rather bad condition. It had two rooms
when my brother moved in. There was one room, sitting-room,
125 perhaps 12x14 feet. There was a kitchen adjoining, perhaps
10x12 feet. Upstairs there was a floor, but it was not ceiled or plastered, only weatherboarded; most of the windows upstairs were out. The house was aimed to have a hall, and my brother made a bed-room in the hall. The house was a frame building weatherboarded with planed stuff; had once been painted. I think the house was built in 1855; it was never completed. There was an old barn on the place in 1864; I would say the barn was of no account. It would do for shelter, but it had been very badly framed, and soon after that it was down and taken away.

Cross-int. 2. Do you know anything of Mr. Dove taking away any rails from the place at that time?

(Objected to as not cross-examination.)

Ans. 2. No, sir.

Cross-int. 3. Was it not your understanding that the west string of fence belonged to Mr. Osborn, and that the south string of fence belonged to Mr. Fudge?

(Objected to as incompetent.)

Ans.2. I think those fences belonged to these parties named; that was my understanding. I couldn't state whether the east and north

126 fences of the upland tract of *of* prairie land were there that year or not; there had been an east-line fence of the tract, but whether it had been moved away I cannot say. We did not rent the upland and had nothing to do with it. Land in that vicinity is much higher now than it was then. I would have to guess at the propo'tion; perhaps its value has doubled or more than doubled since 1864.

H. W. CLARK.

MOSES CLARK is called as a witness for the complainant. Being duly sworn, he deposes as follows:

Ques. 1. What is your name, age, and place of residence?

Ans. 1. Name is Moses Clark; age, forty-three years; reside in Benton County, Oregon. I am acquainted with the Rachel Dove donation land claim, the property in dispute in this suit.

Ques. 2. State whether you were a tenant upon that land in 1865.

(Objected to as immaterial.)

Ans. 2. I was.

127 Ques. 3. State as whether the lease was oral or written.

(Objected to as immaterial.)

Ans. 3. It was oral.

Ques. 4. Who from?

(Objected to as above.)

Ans. 4. O. H. Smith.

Ques. 5. To whom did you agree to pay rent?

(Objected to as above.)

Ans. 5. We paid to Judge Hayden, but we agreed to pay to Smith or his order in the contract of lease. We paid to Hayden by Smith's order. The rent was paid sometime in October or November, 1865. I have been over about all of the land and am acquainted with it.

Ques. 6. State the nature and the quality of that tract of land.

(Objected to as immaterial.)

Ans. 6. The bottom land was very rich land. The prairie land or upland was not so good. I think we had in grain that year fifty acres of bottom land. There was more bottom land on the other side of the slough, some 30 or 35 acres, but whether it was cultivated that
128 year or not I don't remember. The upland was pretty much all
prairie, somewhere near a hundred acres of it. A part of it had been in cultivation, but not all of it. The balance was partly brush land and partly timber land. I don't think the brush and timber land was more than a third of the 320 acres.

Ques. 7. State from your judgment and from your acquaintance with the premises what was its value in March, 1864—the 320 acres with its improvements.

(Objected to as incompetent, immaterial, and not the best evidence.)

Ans. 7. I think it ought to have been worth three thousand dollars then.

Ques. 8. State what, in your judgment, the cultivalable portions of that place ought to rent for per acre in 1864.

(Objected to as above.)

Ans. 8. I don't know what it would rent for. For cash rent about that time I think the bottom land would have rented for $3.50 or $4.00 per acre. There was no brush land at that time that amounted to anything for pasture.

129 Cross-examination:

I don't know of any land in that vicinity being rented for cash that year. I don't recollect how much rent I paid. It was in grain—a third of the grain. I think it was in wheat and oats—mostly oats. I paid more than 200 bushels in all. We raised something over seven hundred bushels of oats that year. I couldn't say how much wheat we raised. There was a dwelling-house on the place that year in rather a poor condition. There were two rooms. I heard my brother's testimony, and he described it about correctly, except there was one end of the house that had been made a granary of. There was an old barn there. It was there when I left the place. Whether it is there now or not I do not know. I used it as a barn; kept my horses there the year I was on the place. I don't think any of the upland prairie was cultivated that year; it was enclosed. I used it for pasture. Something over a hundred acres enclosed. There was a string of fence, probably not on the line between the land and Hurt's place. It was afterwards moved and put on the line.

130 The bottom land that *that* we cultivated had a good many wild oats, and people thought then that they were pretty bad. Now a piece of land like that we would call pretty good. I don't know of any place in that vicinity being sold about that time except Hurt's place. I don't know what Hurt gave, but I understood it was about $2,000.00 or $2,500.00. Hurt's place was part of the same donation claim as Rachael Dove's; I don't know hardly which half was the best. I believe the old lady's half had the most bottom land, and the house was on Rachel's half, and most of the improvements. I don't know how Hurt bought, whether at public or private sale, though I understood he bought from Butler at private sale.

Cross-int. 1. From your observation, is land as likely to bring as good a price sold under the hammer as it does at a private sale?

(Objected to as immaterial and not cross-examination.)

Ans. 1. Well, no, sir; not as a general thing. The bottom land was all in one field; the upland was cut off by a division fence. I

131 don't recollect now whether it ran clear across or not. It was eight or ten rods then from the line; since then it has been moved upon the line. I never traced or saw traced the lines of that land. I suppose the line was run through by a surveyor, and understood that Hurt had it surveyed, and moved his fence on to the line. I don't know anything about the line. I was not there when they surveyed it. I only know what they call the line. I don't know whether what they call the line is the true line or not.

As to the barn, I would say, in connection, I know the barn is not there now. I meant to say that I don't know whether it was torn down or fell down.

M. CLARK.

JOHN SPRINGER is called as a witness for the complainant. Being duly sworn, he deposes as follows:

Ques. 1. State your name, age, and place of residence.

Ans. 1. John Springer; age, 55 years; reside in Polk County, Oregon.

Ques. 2. State whether you are acquainted with the premises in controversy in this suit.

132 Ans. 2. I am; I was through it and over it about the spring of 1864. I knew something of it about that time.

Ques. 3. State if you formed any estimate of its value about that time, or made any offer for it about that time. And, if so, what sum did you offer for it?

(Objected to as incompetent and immaterial.)

Ans. 3. I didn't offer for that half; I offered $3,000.00 for the other half.

Ques. 4. State what, in your judgement, from your knowledge of the premises, was Rachel's half worth in the spring of 1864.

(Objected to as incompetent and immaterial.)

Ans. 4. I think it was worth ten dollars an acre. There were some fences then that were good, what there was of them. There were two lane-fences and one cross-fence somewhere near the line. The house had been started for a good house, but was not finished. It was about 30 feet long by 16 feet wide, two-story house. It was unfinished. The big room was finished, and a little room they lived in was finished. I
don't know whether the kitchen was finished or not; they used it.

133 Ques. 5. State what the value of the improve' on the Rachel
Dove claim was in 1864.

(Objected to as above.)

Ans. 5. The lane-fences were nearly a half mile long. The cross-fence was about the same length, and there was a fence on the further side. I should suppose the improvements couldn't have been put there short of about a thousand dollars altogether. I am acquainted with the present improvements on the place. The present improvements are not worth half as much as the improvements there in 1864.

Ques. 6. Take it year by year from 1864 to the year 1877, what in your judgment would be the rental value of the Rachel Dove claim per year?

(Objected to as immaterial and incompetent.)

Ans. 6. Such land has generally rented, when it is fenced in, for about three dollars per acre. I have known a good deal to be rented in that way.

Cross-examination:

My occupation is sometimes one thing and sometimes another. I
have been keeping a stallion for the last year or two. I sold a
134 farm once in Oregon. I never bought any. I sold farm at the
Indian reserve at Grand Ronde; I owned the farm. I have
lived with Mr. Dove some; I used to live with him considerable. I offered $3,000 for the other half to Mr. Dove and Mr. Butler together; that was in 1861. I didn't offer them cash; I offered them cattle and horses at cash price. I don't know of any farm selling in that vicinity in 1864 or 1865 for cash. In 1864 I lived with Owen P. Turner in Yamhill; in 1865 I lived part of the time with Falkin, in Sheridan, and part of the time near Grand Ronde. Part of that year I was taking care of a horse. The last year that I rented a farm in Oregon was in 1867. I rented a farm in Yamhill County. That was not the last, however; the next year I rented Jonathan Toney's place; I paid cash rent to both of them at three dollars per acre. There was about 100 acres of the one and about fifty of the other. I know this land in controversy has been pretty badly set in with wild oats, but worse than land ordinarily is in that vicinity, I think; I know it can't be worse than Mr. Hayden's land
over on the island.

135 I have known land within five miles of this land to be sold for
cash since 1865, according to what I have heard.

JOHN B. SPRINGER.

E. P. Dove, is called as a witness for the complainant. Being duly sworn, he deposes as follows:

Ques. 1. What is your name, age, and place of residence?

Ans. E. P. Dove; am 35 years *of* old; reside in Polk County, Oregon.

I have lived in Polk County ever since 1845. I have generally been engaged in logging on the river. I have not farmed much—only when I was a boy, and worked for my father. I have seen land rent in Polk County and selling from 1850 on down. In 1864 I was acquainted with Rachel Dove's donation land claim, and have been acquainted with it ever since.

Ques. 2. What, in your judgment, was the value of that land in 1864?

(Objected to by defendant as immaterial and incompetent.)

136 Ans. 2. I think it was worth ten or twelve dollars an acre.

Ques. 3. What, in your opinion, was the value of the improvements on it at that time?

(Objected to as incompetent and immaterial.)

Ans. 3. I don't think they could have been put there for less than fourteen hundred dollars.

Ques. 4. State whether you are acquainted with the present improvements on the place. And, if so, what in your judgement is their value?

(Objected to as above.)

Ans. 4. I am acquainted with them. I think they are worth about two-thirds as much as they were in the first place. They are old. The orchard has gone down.

Ques. 5. Are you acquainted with the price that land of that kind rents for in that vicinity; if so, what is it?

(Objected to as above.)

Ans. 5. Yes, sir; all I know is from what other land rents for. I think it would be worth three dollars per acre for the cultivated land; there
must be 150 acres of cultivated land on that piece. Rachel
137 Dove is my mother. I remember the day when her claim was
sold at sheriff's sale. It was at Eola, in Polk County. I saw the defendant that day. I had some talk with him in regard to this land claim of my mother's. I talk' with him there at Eola, at Waller's store; I don't remember the time of day.

Ques. 6. State, if in that conversation the defendant sent any word in relation to the land in dispute by you to your mother. And, if so, what word did he send?

(Objected to as leading, incompetent, and immaterial.)

Ans. 6. He did. He told me to tell my mother to not be uneasy; that he had left a man there to bid off the place for her. He wanted to know if I would take a lot of sheep on shares.

Ques. 7. What, if anything, did you do in regard to carrying the communication to your mother as he requested you?

(Objected on same grounds as above.)

Ans. 7. I told her just the same as he told it to me.

Ques. 8. Did you ever have any conversation with the defend-
138 ant at any other time in regard to that land?

Ans. 8. Yes, sir; I did.

Ques. 9. State when and where, and what was said.

(Objected to as immaterial and incompetent.)

Ans. 9. Yes, sir; I did; at Mr. Dice's, in Polk County. It was in the spring—early in the spring of 1865. He told me to tell father not to cut any more logs on that place. He said it was too much like selling half of the place to redeem the other half. That was all I remember.

Ques. 10. What did he refer to when he said it was to' much like selling one half of the place to redeem the other half.

(Objected to, because the witness has stated the whole conversation on that subject, and the question calls for an opinion as to what defendant refer'ed to by what was said, and as incompetent.)

Ans. 10. I said he was getting the saw-logs to get money to redeem the land, and the def't said that in answer to what I said.

139 Cross-examination:

I have told all that the def't told me to tell my mother at Eola. I was in the store. He said, "Ed., come out; I want to talk with you." I went out. He told me then to tell mother not to be uneasy; that he had left a man there to bid off the land for her. He was in a hurry to go away. He was going to Salem, I believe. No one else was present at the conversation. He took me out where his horse was. I don't recollect what day of the week it was; I don't recollect what month it was. It was some time in the spring of 1864. He said he left a man there to bid the land off. He didn't say he left him at Dallas. He used the word "there." I couldn't say whether the land was sold that day. Mr. Hayden said it was to be sold that day, or said he left a man to bid the place off. I don't say he said it was to be sold that day. All he said was to "tell your mother not to be uneasy"; that he had left a man there to bid the place off for her. Then he commenced to talk about the sheep. He didn't say what land it was, nor who the man was. Said nothing about how much he had instructed the
140 man to bid. Waller was in the store when the def't called me out. I couldn't say whether any one else was there or not. Waller lives there at Dixie, in Polk County. Orville Waller is his name. There is a dwelling-house—the same house on the place now that was there in 1864. It has been patched up some since 1864. The sill has rotted away, and they have let it down on the ground. I guess no new sills have been put under since 1864; if they have I have never seen them. There has been a barn—a sort of a barn—built up there in the orchard since 1864. There was a fence on the north line, next to Hurt, running out nearly to Osborn's fence in 1864, fencing off a field. Between that and Osborn there was a pasture. When Hurt got the place the fence was put on the line. I estimate the improvements in with the land, when I say it was worth 10 or 12 dollars an acre in 1864. I think there was an acre and a half in orchard in 1864; may be more. The orchard is in a worse condition now than then. Two rows of trees are gone. Some have been broken down,
141 and then this barn has been built right in the orchard. There is a new cross-fence in the bottom, made since 1864. It must be half a mile in length. It is a rail fence. There was a fence west of Hurt in 1864. I don't think there has been a new fence built there since. They may have put in new rails; but there was a fence there in 1864. There was one string of fence there in 1864 that is not there now. That is the west string from the lane. They have moved it off or moved it out, though that field is still an enclosed field. There was no more land enclosed on her half of the claim in 1864 than there is now. There is just about the same amount enclosed now that there was then. I meant to say that the houses and fences were worth more by one-third in 1864 than they are now. The barn on the place is just about as good as the barn there in 1864. If they had put it in a different place it would be a better one; but it is in the orchard. There is a little more land in cultivation on the place now than there was in 1864. It was some time early in the spring of 1865 that the defendant told me to tell my father to stop cutting logs on the place.
142 No one else was present. We both met right there in the lane at Mr. Dice's. My father had been cutting saw-logs off the land, and was going to sell them to a man named Ladd. I couldn't tell how many logs he had cut off the place at the time. I guess he had cut as

many as fifty. They were worth five dollars a thousand. The trees were sometimes 3 feet and sometimes smaller, down to 2 feet. I guess there were none cut as big as four feet. My father stop' cutting logs then and left them there, and they are in the woods yet. He was not living on the place at the time. He lived on the land in 1864. He moved off in the fall of 1864. He cut logs on the place in the spring of 1864. Before he moved off he cut 37,000 feet that spring and sold them at $5 a thousand. That 37,000 feet was moved off the land in the spring of 1864. He cut some logs in the fall, 1864, and winter of 1865, and they are there yet, and have never been moved off. Tulotson was not there logging in the fall of 1864. All the logs father cut in the fall of 1864 and the winter and spring of 1865 are there on the land yet.

143 I don't know of any farm in that neighborhood selling in 1864 or 1865 for cash.

Redirect examination:

When I speak of logs being $5 a thousand, I mean the price delivered at the mill. The logs were worth cut upon the ground $1.25 a thousand. The timber before being cut is worth four bits a thousand.

Recross-examination:

In 1864 there was, I should think, nearly 60 acres of timbered land on the place, exclusive of brush land. The price of timber and saw-logs depends some on the location, with reference to their location with reference to the mills. This land was about two miles and a half or 3 miles from the mill. There was a big slough running by the timber right down to the mill, and we floated the logs down. If the 60 acres of timber land was cut off and timber cleaned away, I don't think the value of the place would be less, but more. I think the timber land would be the best land on the place. I would say, in connection with my testimony, that the house has not been let down on the
144 ground, but blocks have been put under.

E. P. DOVE.

Upon this 4th day of January, at 9 o'clock a. m., the said parties appear as before, and hearing hereof is resumed.

Moses Clark is recalled as a witness for the plaintiff.

(Defendant's counsel objects to the witness being recalled.)

Ques. 1. State, if you know, anything of the lease and the parties to it more than you testified yesterday.

(Objected to, because the terms of the lease are wholly irrelevant, immaterial, and incompetent.)

Ans. 1. I was along with Smith when he made the contract with Mr. Dove. I believe the contract was that he was to have the land for two years, and let Mr. Dove have a certain amount of money, I don't recollect how much, and then he was, in addition to that, to keep the place until he got his pay.

Ques. 2. State, if you know, what this money was advanced to Mr. Dove for.

145 (Objected to as above, and because the d'f't cannot be effected by a contract or transaction between these parties, he not being present.)

Ans. 2. I don't know that I heard at that time what was to be done with the money.

Ques. 3. Did you hear at any time? If so, state what.

(Objected to on same grounds as last above.)

Ans. 3. I found out afterwards from Smith and Dove both that Mr. Dove wanted this money to pay Judge Hayden on that land—the land in dispute in this suit.

Ques. 4. Did you understand that before or after Mr. Smith surrendered the place to Judge Hayden?

(Object' to on same grounds as above.)

Ans. 4. I understood it before.

Cross-examination:

Ques. 1. Where is O. H. Smith?

Ans. 1. I understand he is dead. He has been dead three or four years. I can't recollect the amount of money he was to let Dove have. I don't know as I ever heard the amount. I surrendered the place
146 to Judge Hayden when I quit. I don't think Smith ever lived
on the place or was in possession of it. When I rented from Smith I was to pay him grain rent. Judge Hayden was not present at any of these conversation' between Dove and Smith, nor at any of the conversations between me and Smith, as I remember. It was not mentioned in this conversation between Smith and Dove that Smith was to pay money rent; I think he was to pay grain—one-third grain. I understood that Smith was to let Dove have this money, not that he did let him have it.

Redirect-examination:

I surrendered the place to Hayden instead of Dove, because I rented the place of Smith, and surrendered it to Judge Hayden at Smith's order.

Recross-examination:

The reason was that I bargained with Smith to keep the place two years provided I wanted it, and Hayden wanted the place. I went to see Smith, and he thought that I had better give it up and let it go. I think Mr. Hayden sent me word by Mr. Dice that he had let the place to another man, and he would want this place right away.
147 After that Judge Hayden came by himself and we talked it over.
He said that he would have to have the place. Then I went to *went to* see Smith, and Smith told me that I had better surrender it up and let it go.

Direct:

I don't know that Smith gave any reason for my surrendering the place to Hayden, only in this way: He said that Hayden would commence suit, and to keep the place would cost more than it would come to anyhow.

M. CLARK.

RACHEL DOVE is called as a witness for the complainant. Being duly sworn, she deposes as follows:

Ques. 1. What is your name, age, and place of residence?

Ans. 1. Rachael Dove; am sixty years old; I live in Polk County, Oregon.

Ques. 2. State where you lived 1862, 1863, 1864, & 1865.

Ans. 2. We lived on our place in Polk County. I was at one time the owner of the Rachel Dove donation land claim. I am the person to whom the 320 acres of that claim was donated. I am ac-
148 quainted with the defendant. Have been acquainted with him
ever since he came to the country. In the year 1862 or 1863 I

had business with him relating to a mortgage. He did all our business—the writing and law business. I recollect my executing a mortgage to the school fund upon my land. Mr. Hayden wrote it. He wrote it in our house. Mr. Hayden said if I would sign it he would see that I didn't lose my place. He said it over and over. It was to the school fund. He borrowed it of the school fund, Mr. Dove did, and they made me sign the mortgage. I think the sum was over a thousand dollars. Mr. Hayden told me three or four times that he would see that I wouldn't lose my land. Mr. Dove handed the money to Mr. Hayden and dropped some of it on the floor; as I picked it up Mr. Hayden said I will see that you don't lose your place; I will mortgage mine first.

Ques. 3. State whether or no you believed what he said.

(Objected to as incompetent and immaterial.)

Ans. 3. Of course I did.

149 Ques. 4. State whether or no you would have signed that mortgage but for the statements of Mr. Hayden made to you at the time.

(Objected to as above.)

Ans. 4. I believed he meant what he said. I don't think I would have signed the mortgage if he had not made those statements. Mr. Hayden was a practising lawyer at that time in Polk County.

Ques. 5. State whether that mortgage was foreclosed against you.

(Objected to as incompetent.)

Ans. 5. Yes, sir; it was. Mr. Hayden came by our house the day it was sold. I wasn't there, but he told my girl not for me to be scared, that he would buy the place in a purpose for me. Then he went on and he met my boy, Ed. Dove, and he told him the same to tell me. Then after it was sold a while, I don't know how long after, he came down to get some money; came to our house; he said he needed some. I told him I would send him up some the next day when Mr. Dove got home. Mr. Dove took it up next day and he got a receipt for it.
150 It was paid towards the place, getting it back.

Ques. 6. Did you or did you not employ Mr. Hayden to attend to that foreclosure suit for you?

(Objected as leading and incompetent.)

Ans. 6. Well, he was attending to it; then he throwed off on us and wouldn't let us redeem it.

Ques. 7. State what, if anything, Mr. Hayden said about the place when he came after that two hundred dollars.

(Objected to as leading, and because the witness has said nothing of two hundred dollars.

Withdrawn.)

Ques. 8. State what, if anything, Mr. Hayden said to you at the time he came to you for money, of which you have testified.

Ans. 8. He said he needed some money; that the place had been mine, and would be mine again. All he wanted was his money back, and he would fix it so that no one could take it from me.

Ques. 9. State whether or no you relied upon the statements
151 of Mr. Hayden or were guided by them in regard to suffering that land to be sold.

(Objected to as leading, incompetent, and immaterial.)

Ans. 9. Yes, sir; I did. I believed what he said.

Ques. 10. If you had not believed what he said would you or could you have made some other arrangement to save your land?

(Objected to as above.)

Ans. 10. Yes, sir; I could have made other arrangements so as to save my land.

Ques. 11. Did you or did you not understand and believe Judge Hayden to be acting for you and as your attorney in regard to that whole transaction about that land?

(Objected on the same ground as above.)

Ans. 11. I always believed he would attend to it right for us. I believed in what he said. I always believed he was our attorney. My daughter's name is Elizabeth Manning. She lives in California. She was not married at the time Judge Hayden spoke to her.

152 Ques. 12. State what she said to you as being the message of Mr. Hayden?

(Objected to as being incompetent and leading.)

Ans. 12. She told me that Mr. Hayden told her to tell me that I shouldn't be scared; that he would bid it in apurpose for me.

Ques. 13. State whether or no you believed that Mr. Hayden would do as he sent you word he would.

(Objected to as above.)

Ans. 13. Yes, sir; I thought he would do as he said.

Ques. 14. How far, if at all, did you rely upon the statements which were made to you as coming from Mr. Hayden in regard to his making this purchase?

(Objected to as leading and incompetent.)

Ans. 14. I believed he would do as he said he would.

Ques. 15. What, if anything, would you have done about buying the land in if he had not sent you any word at all?

(Objected to as leading and incompetent and immaterial.)

153 Ans. 15. If he had not sent such words as them, we could have got somebody else to attend to it; we would have tried to get somebody else to attend to it.

Ques. 16. Could you at that time have made arrangements to buy in the place yourself?

(Objected to as above.)

Ans. 16. Yes, sir; I could have made other arrangements.

Cross-examination:

Mr. Hayden wrote that mortgage. I am sure of that. I am just as sure of it as I am of anything else I have sworn to—just as sure as I am sitting here. I saw him write it. He wrote it at our house. It was read over to me. Mr. Boothby read it over to me. I acknowledged it before Mr. Boothby. He came in next morning and read it. The mortgage was laying on the cupboard from the time Mr. Hayden wrote it until next morning, when Mr. Boothby came in. That is the only mortgage on that place I ever signed. Mr. Bolter and Mr. Washburn signed as witness'. Mr. Bolter lives at Humbolt. I don't know where Mr. Washburn is. They signed as witnesses the day after it was

154 written, and the same time that I signed it. I can't tell you what other writing Mr. Hayden did for us, other than this mortgage. He always done the writing. I can't tell you just now what other law business he ever did for me. He was Mr. Dove's lawyer, and of course if I had any business I would get the same lawyer.

Ques. 1. Please state any other business that the def't ever did for you as a lawyer besides writing this mortgage, as you say he did.

(Objected to as incompetent.)

Ans. 1. I don't think it is right for him to ask such questions as that. He never just exactly did any writing for me, but he was Mr. Dove's lawyer, and I considered that he was mine.

Ques. 2. Please state any other business or business transaction of any kind, in writing or otherwise, that Judge Hayden ever did for you as a lawyer prior to the time you signed that mortgage.

Ans. 2. He never done no writing just for me, but he always done the writing for Mr. Dove.

155 Ques. 3. Please state any other writing done by the def't for Mr. Dove prior to the time *of* this mortgage was executed.

Ans. 3. He done the writing for a suit he had with Griswold. Mr. Hayden attended to the case for Mr. Dove. Mr. Dove borrowed the money. This mortgage was given for to pay Mr. Griswold. He got it from the school fund. I don't know what man gave it to him. Mr. Dove gave the money to Mr. Hayden, and I don't believe Mr. Hayden ever gave the money to Mr. Griswold. The day I saw Mr. Dove hand Mr. Hayden the money and saw some of it fall on the floor was several days after I signed the mortgage. Mr. Hayden was not at our house at the time I signed the mortgage. Mr. Boothby didn't explain the mortgage to me, nor examine me about signing. He read it over to me.

Ques. 4. You said they made you sign the mortgage. If Mr. Hayden was not there, who made you sign it?

Ans. 4. He told me to sign it when he wrote it, and he told me I shouldn't lose my place. I am sure that Washburn sign' that mortgage as a witness. I am as sure of that as I am of anything I have
156 stated. Mr. Theodore Ingalls was there the day the mortgage
was signed, but he wasn't in the house; he was out at the barn looking at some cattle. I am sure that Mr. Ingalls didn't sign the mortgage as a witness. There was only two, Mr. Bolter & Mr. Washburn, at that time. Somebody else may have gone and put his name to it afterwards. I don't know just exactly how much money was borrowed from the school fund. They handed Mr. Hayden a thousand dollars of it. There was more of it than was handed to Mr. Hayden, I can't say how much. Mr. Holden, the sheriff, got it to pay Griswold. The thousand given to Hayden was for to go and give to Griswold. Griswold had a judgment against my husband. The reason we didn't give it all to Hayden was that the sheriff had had some before. I don't know how much the sheriff had had before. I don't know how much we owed Griswold.

Ques. 5. What interest did Hayden have in the matter, that he said he would mortgage his farm before you should lose yours?

157 Ans. 5. Why I expect he wanted to keep the money. I don't know what else. I never heard any one complain that Griswold hadn't been paid, but I heard them say that that amount hadn't been paid on the documents and that the papers didn't show it. I don't know who I heard say that. I heard that a good while after the money was paid to Hayden. It was after the mortgage was foreclosed. My daughter Elizabeth is the wife of Charles Manning, the plaintiff. Manning never has paid me any money on this land, but he was going to. He never gave me his note. I can't say when I saw Manning last; I think eight years ago. Manning wrote first about having the land conveyed to him; said he would take the matter off our hands. I have not the letter with me.

(Objected to all above about as immaterial.)

That receipt that Mr. Hayden gave for $200 is here. My husband has it. I have a copy of it. I don't recollect the year in which that mortgage was executed; at the time suit was brought to foreclose
158 the mortgage we didn't have money enough on hand to pay it off.
We tried to borrow money of Mr. Ladd to pay it off before the

suit was commenced, but Mr. Hayden said that we couldn't mortgage the same place over to Mr. Ladd. He wouldn't let us. That was after they foreclosed the mortgage and sold the land, that Mr. Hayden wouldn't let us mortgage the place to Mr. Ladd. We didn't try to borrow any money to pay off the mortgage before the land was sold. I never tried to make other arrangements, but I know we could have got somebody else besides Mr. Hayden. Nothing was said between Mr. Hayden and us about how much he was to bid for the land for us. We never offered Mr. Hayden his money back more than we paid that two hundred dollars; then he throwed off on us and we couldn't do anything more. I know that Mr. Hayden told my son and daughter those things they told me, because they told me so. I have no other means of knowing it. We lived on the place several years after Mr. Hayden bought it. I
159 can't tell you how long. I don't know in what year the place was sold. At the time the sale took place I think Mr. Hayden lived at Dallas. He had a farm there on the hill above Eola, so he said. He lived on that place before he moved up to Dallas. I don't know how long it was after he bought the place that I saw Mr. Hayden first. It was when he came to get that money, the money for which the receipt was given. The receipt was given to Mr. Dove when he handed him the money. I had seen him between the day of the sale and the time he came after this money two or three times—I don't how many times. I had had no conversation as I know of with Mr. Hayden about buying in the land for me prior to his sending me those messages. The money was taken up to Mr. Hayden the next day after he came down there. I hadn't had any talk with the def't about the land from the time he bought it in to the time he came to get the money. I never had
160 any conversation as recollect with Mr. Hayden before the sale about his buying in the land. I always allowed he would attend to it. I made no objection to signing that mortgage. I don't recollect the amount of money the mortgage was given to secure. At the time Mr. Hayden wrote the mortgage I don't know as he had ever read it to me.

RACHEL + DOVE.

B. DOVE is called as a witness for the complainant. Being duly sworn, he deposes as follows:

Ques. 1. What is your name, age, and place of residence?

Ans. 1. B. Dove; am 64 years old; reside in Polk County, Oregon. I have resided there since 1845.

(Counsel for def't objects to having this witness sworn or to taking his testimony because he made oath to the complaint as the agent and att'y in fact of the complainant.)

Ques. 2. State if you are acquainted with land in dispute in this cause.

161 I am. It is the donation land claim of my wife and me. It is my wife's part that is in dispute in this suit. I am acquainted with the defendant. Have known him since the fall of 1852. When I first knew him he was teaching school. From the time he quit teaching up to the present he has been practising law. In 1859 he was practising law. I know about a mortgage made by me and my wife to the school fund in 1859. The mortgage covered my wife's part. It was mortgage' to the school fund for money to pay a judgment against me in favor of Bill Griswold, and I got the money and I gave Mr. Hayden a thousand dollars of it to take over and pay on that judgment, and whether he paid it or not I do not know. Sullivan in searching

the records tells me there is no account where Mr. Hayden ever paid any money.

(This testimony from Sullivan is objected to by def't as hearsay and immaterial.)

Ques. 3. What was said between you and Mr. Hayden about that mortgage?

162 (Objected to as immaterial and incompetent.)

Ans. 3. I heard the talk between my wife and Mr. Hayden. Mr. Hayden said he would electione'r and get the commissioner to sell school land, so that I could get the money—he would use his influence. He did so, and he bought some of the school land himself. Along about that time him me both persuaded the old woman to sign that mortgage. By old woman I mean my wife. Mr. Hayden told her that she shouldn't lose her land; that there was no danger of her losing her land. He said again when he got that thousand dollars in money, he said, I recollect distinctly, that he would mortgage his own place before he would see her lose the place. Mr. Hayden drew the mortgage. He drew it at my house.

Ques. 4. State whether or not before and at the time of drawing that mortgage Mr. Hayden was your attorney; what business did attend to for you?

(Objected to as immaterial and incompetent.)

163 Ans. 4. He attended to all my business. He was my attorney.

Ques. 5. Did your wife know that he was your attorney?

(Objected to as above.)

Ans. 5. Most certainly she did know, for she knew I kept Mr. Hayden in bread and meat for attending to my business. He attended to a big suit I had with Griswold, and I believe that was the only lawsuit he attended to; but he attended to other business, settling up book accounts, &c. In the foreclosure of this mortgage he acted as attorney. I considered that he was acting as attorney for her, for I was up north and got home just a day or two before court. I attended court and seen him there, and he told me he was going to attend to it whether I came home or not. He answered there by a demur'er; the demur'er was overruled, judgment went against us. I had conversation with him about that $200 when I took it up to him. I took him up two hundred
dollars in gold coin and gave it to him in payment on the place,
164 to pay his money back, and he gave me a r'ceipt, and at the same
time he talked about letting us have some sheep to keep on shares, to keep on the place now in dispute. There were some sheep then at Dallas, at Mr. Hayden's then, and Mrs. Hayden asked why I couldn't fetch them sheep down with me. Mr. Hayden objected and said there wasn't enough of them to be bothered with. He said he had more sheep. Then I made a bargain with this Mr. Smith, by my wife's consent, to rent the place to him, and he was to give me one-third of what he was to raise on the place.

(All the above and following testimony about the contract with Mr. Smith is objected to as incompetent and immaterial; what contract was made between witness and Smith to which def't was not a party nor present when they were made).

He was to loan me money for to finish paying Hayden up. I was to pay him 10 per cent. interest and he was to keep his place until he got his money back. I think there was then due Mr. Hayden on the purchase about seven hundred dollars in gold coin.

165 Ques. 6. State if you know or remember what greenbacks were worth in gold in 1864.

(Objected to as immaterial.)

Ans. 6. They were worth about four bits on the dollar; that was about the average price.

Ques. 7. State if you know at the time you made that contract with Smith that Mr. Hayden claimed that land by virtue of purchase or not.

(Objected to as incompetent and immaterial.)

Ans. 7. I didn't know that he claimed it at all. I understood that all that he wanted was his money back, with interest.

Ques. 8. State what was you' habit as to acting for your wife as to her claim and her business.

(Objected to as incompetent and immaterial.)

Ans. 8. I acted about the same as any other husband with his wife. We generally agreed pretty well. I managed the place mostly to suit myself.

Ques. 9. Did your wife confide mostly in your management as
166 to the claim, or did she not?

(Objected to as above and as leading.)

Ans. 9. She did, except in mortgaging that place. She opposed that, and Hayden and me had hard coaxing for to get her to sign the mortgage. I made all the efforts I could to get money to pay off Mr. Hayden. I went to cutting saw-lo*ws*, and Hayden sent me word not to cut the timber, that it looked to' much like selling one half of the place to pay for the other. I also could have mortgaged the place to Mr. Ladd for the money, but I got word that Mr. Hayden wouldn't agree to it. About that time when I gave him the $200 he looked over and said he had borrowed some of the money from Butler in greenbacks, and he had to pay him more than four bits on the dollar. I think he said there was about seven hundred dollars due him on the place; that he lacked about that much of having his money back after getting the $200.00. This seven hundred dollars was what I was trying
to get of Smith. After Smith didn't come on the place and we
167 didn't get the money from Smith as we expected, we tried to get
it of Ladd.

Ques. 10. Did or did not this conduct of Mr. Hayden prevent you from paying up the balance of $700?

(Objected to as incompetent and immaterial.)

Ans. 10. Yes, sir; it was by his conduct. He wouldn't let me do as I pleased with the place. I would have mortgage' it to Mr. Ladd and paid him.

Ques. 11. State now what was the value of that land in 1864.

(Objected to as immaterial and because the price it brought at sheriff's sale is the best evidence of its value.)

Ans. 11. I think it was worth four thousand dollars.

Ques. 12. State what you think the improvements were worth at that time.

(Objected to as immaterial.)

Ans. 12. They were worth at least two thousand. They cost me
over $3,000. Nearly of the 320 acres was under fence. It had
168 a barn. The barn was getting old. It had a frame house 40
feet long by two stor*y*s high—16 feet wide. It had an addition,
12x40 feet, one story high, with shed roof.

There were two rooms finished. The south*e* end room and the kitchen part in the one-story part. There was a stairway. The building had cost me over fifteen hundred dollars. It cost more to put up buildings then than now. I paid $20.00 a thousand for lumber. The house was built in 1855. There was something near two hundred acres of plough-land on the place in 1864, on this 320 acres.

The rental value of the place ought to have been under good cultivation, worth six hundred a year in 1864 and 1865, and from that on up to the present time. It ought to raise under good cultivation, at least, twenty bushels of wheat to the acre, and forty bushels of oats. The land is worth now, I think, about thirty dollars an acre.

Ques. 13. What reasons had you to believe, from acts, words, or circumstances, that Mr. Hayden was yours and your wife's attor-
169 ney in the foreclosure of that mortgage?

(Objected to as immaterial.)

Ans. 13. Because he had always attended to my business before, and promising her that she shouldn't suffer loss by signing the mortgage, and atelling me at the time of the court that he intended to attend to it for her if I hadn't got home. I don't know as I ever paid him anything for attending to the case. He never made out any bill against me or my wife for his services in that case.

Ques. 14. Was there any confidential relation or special cause for conference existing, to your knowledge, between yourself and wife and Mr. Hayden as to legal or business matters?

(Objected to as immaterial and incompetent, and because witness should state the facts only.)

Ans. 14. I thought there was. We were always friends, and he had transacted the business a long while, and we were well satisfied with him.

Ques. 15. What ability had you or your wife, if any, to have
170 saved or redeemed that proprety but for the conduct of Mr. Hayden?

(Objected to as immaterial and incompetent.)

Ans. 15. We had the chance to mortgage it to Mr. Ladd, and if Mr. Smith had come up to time we would have had the money there. I don't know the cause of Mr. Smith surrendering the place to Mr. Hayden. I know I was thunderstruck. I have no knowledge of Mr. Hayden getting Mr. Smith to turn the place over to him; only my opinion, that's all.

Ques. 16. What is your opinion?

(Objected to as incompetent and immaterial.)

Ans. 16. I believe Smith was bribed by Hayden to do it.

Ques. 17. State what facts, if any, lead you to that opinion?

Ans. 17. By him athrowing up the lease and not coming on the place, and putting another man on it, and by turning the rent over to Hayden.

Ques. 18. At the time that Mrs. Dove received word from Mr. Hayden that he would bid on the place, what reliance, if any, was
171 placed in that statement by you and Mrs. Dove?

(Objected to as incompetent and immaterial.)

Ans. 18. We had all the confidence in the world that he would do just as he said he would.

Ques. 19. What, if anything, would you have done about in purchasing in the property if the def't had not sent any word to Mrs. Dove?

(Objected to as above.)

Ans. 19. We would have let Mr. Jones bid the place off—Wm. Jones.

Cross-examination:

I was not present at sheriff's sale when the land was sold. I don't know exactly where I was; I think I was in Polk County. My wife did not attend that sale. I think Wm. Jones did not attend the sale. I don't know where he was that day. I lived then about twelve miles

from Dallas. I don't know what time of day it was that the message was left at my house for my wife. I was not at home. I learned next day, I believe, that such a message had been left there. That was not the first that I heard of an understanding that he was to bid in the land for my wife. I heard of it when the land was advertised to
172 be sold. Mr. Jones told me that intended to run the land to
$2,700 if Hayden did not bid it in for my wife to redeem. I don't know as Hayden and me had ever talked before about his bidding in the land. I never asked him to do it as I recollect of. I don't know as Hayden and my wife had ever talked about his bidding in the land for her prior to his sending her that message. My wife had told me prior to his sending the message that Mr. Hayden would bid the land in for her. She said that Hayden had promised to do it. That was before Mr. Hayden had left this message. She said that Hayden had promised her to do it. She said this in the family. I don't know who was present when she said it. Wm. Jones told me that if I was willing he would make the land fetch $2,700, if I did'nt want to redeem it. I told him that the old woman wanted to redeem it and Hayden was going to bid it in for her, providing it did not go for to' much.

Ques. 1. Didn't you just now swear that the first you knew of any promise or understanding that Hayden was to bid the land in
173 for your wife was that Wm. Jones told you so?

Ans. 1. The way I think I answered the question was in this way, that Wm. Jones told me before the sale of the land that he would run the land up to $2,700, providing I didn't want to redeem it, and I told I did want to redeem it, or that she did.

Ques. 2. Did Jones tell you or did you tell Jones that Hayden was to bid in the land?

Ans. 2. It was me told Jones. I don't say my wife didn't talk with Hayden. I don't know what talk she had with Hayden. I know what I talked of with Hayden, and what talk me and my wife had.

Ques. 3. Please state when and from whom you learned for the first time that Hayden was to bid in that land at the sale for your wife.

Ans. 3. It must have been from my wife some time along after the the place was advertised for sale. The reason I didn't raise enough on my farm to pay off the mortgage was that in 1861 and 1862 came the high water and washed my improvements off, and *and* it took me that time to put them back. The flood carried all the fence off the bottom land.

I made a crop on the place in 1859. I made a crop in 1860; also in 1861. I made a part of a crop in 1863. I had about 50 acres of
174 the bottom under fence in 1863. I made a crop in 1864. I will
swear that the def't wrote that mortgage in my house. I judge that is as near the truth as anything else I have testified to. I never heard any complaint that that money wasn't paid to Griswold more than that Sullivan says there is no credit. The judgment was over $8,000, and I finished paying it up afterwards; paid some $2,600 on it afterwards. I had David Logan and Shields both employed with Hayden in the Griswold suit. I was at the sale of the school land and pointed out the land for Hayden to buy. It was a few weeks before the loan was made me from the school fund. The last I saw of the receipt Mr. Hayden gave me Messrs. Thayer & Williams had it. All the reason I can give for Mr. Hayden saying he would mortgage his own farm before he would see my wife lose hers was that Mr. Hayden was attorney for Mr. Butler, and Mr. Butler was my security in the Griswold

debt. The witness' to the mortgage was George Bolter and Mr. Washburn.

Mr. Hayden at that time owned a donation claim of half a section on the hill above Eola. I don't know how much it was worth then.

I had no objection to Moses Clark going on that place, but
175 when I found that Smith wouldn't go on it I tried to get Clark
off. It was some two or three months after Smith took the lease that Clark went on the land. Smith never went on the place himself. Smith was a single man and had been making his home with this Clark. Clark's wife had been keeping house for him. Smith never gave me any of the money he agreed to let me have. It was along in March or April in 1864 that I heard that Smith would not comply with his contract. I think it was 1864.

The Ladd was old Jimmy Ladd, from whom I was to get the money. He offered to let me have the money on mortgage enough to pay Hayden off. I think he spoke to Hayden about . He told me he had. I never spoke to Hayden about it. I talked to Mr. Hayden about defending the foreclosure. Mr. Hayden said we might put in a defence. I told him the complaint wasn't good, because I signed the mortgage first, it being her land. Mr. Hayden said he had a better defence than that, and put in a demur'er. After the demur'er was overruled there was no defence. This Griswold suit and this mortgage foreclosure
were the only suits that Hayden ever attended to for me, but he
176 attend' to my other business. Hayden drew other deeds & mort-
gages. He drew a deed from John Davis to me for the 320 acres of land. Davis and I both employed him. I was keeping him in bread and meat then to do my business. I won't be positive which of us spoke first to Hayden about drawing the deed. He also drew at the same time a mortgage from me to Davis. That was about a year, may be two years, before this mortgage to the school fund was drawn. I can't name any other deed or mortgage that Hayden ever drew for me. I talked to Smith about Clark paying the rent to Hayden. I don't think I ever talked to Hayden about it. I remonstrated with Hayden as soon as I found that he wasn't going to let me have the rent and take his money. I went up to Dallas to see him, and had a talk with him. He said he would give the old woman a hundred head of sheep and the rent of the place if she would sign a quit-claim deed for the place. I told him that I would go home and see her—see what she would say about it. She wouldn't agree to it. She said he might
have his old sheep; she wanted the place, and he had agreed
177 to let her have it. I think Mrs. Hayden was present at that
conversation. It was at Hayden' house in Dallas. That was before Clark left the place. I think it was before; I don't know how long before. It could not have been much before. I moved off the place in the fall of 1864 or 1865. I moved on the island, and the house was empty for some time. Clark didn't come in until late in the winter. I left the place because I had rented it to Mr. Smith. I think it was in October that I rented the place to Smith, in 1864. I don't know as Mr. Hayden told me that time I paid him the $200 how much he had borrowed of Butler. He said he had borrowed greenbacks, and he had to pay more than the market price for them. I believe that the reason Smith didn't move on the place was that Hayden bought him off. I understand that Smith is dead. I don't know E. C. Dice. I know Elza Dice and his wife. I was not there at their house in the last month.

Ques. 4. Did you on the first Monday in December last, at the house

of Elza Dice, in Polk County, in the presence of Elza Dice and
178 his wife, Minerva, say to them, or one of them, that if your suit
with James Jones was in as good a fix as your suit with Ben. Hayden you would be satisfied, or you would gain it, or words to that effect.

(Objected to because relating to matter not brought out in direct examination and as seeking to impeach def't's own witness, there being nothing in the examination-in-chief that the statement could possibly allude to, and because the question is leading.)

Ans. 4. I don't recollect saying anything at all at that time about either one of the suits, and I don't know as I was at Mr. Dice's house. I know James Jones of Polk County; I know his wife somewhat; I know where he lives. He was not living at the same place in 1864. I think he was living below on a place of his own.

Ques. 5. Did you in the fall of 1864, near the house where you resided
in the road and by the orchard on the place in controversy say to
179 James Jones and his wife that Hayden had bought the land and
paid for it, and that you were satisfied you would never get it back, but that you had to tell the old lady—meaning your wife—so to pacify her, or words to that effect.

(Objected on same grounds as last above, and because it is hearsay and incompetent.)

Ans. 5. I never told no such a thing. The summons in that foreclosure suit was not served on me personally. I was not at home. I got home two or three days before court met. I don't know when the demur'er was filed. I never tendered back to Hayden any of the money he paid for the place except the two hundred dollars I paid him. The first time I knew that Mr. Hayden claimed to own the place was when Smith paid the rent over to him and he put Clark out. I don't know whether I can produce that $200 receipt. I can't get it to-day, but I think it can be had. I didn't ask Hayden to allow me to mortgage the
place to Ladd. All I know about his refusing was from what
180 Mr. Ladd said and the word he sent me—I mean the word to my
son; and Mr. Clark also told me that Hayden wouldn't allow me to mortgage the place. I guess they knew so from what Hayden said. Ladd also told me. Ladd told me he would let me have the money; that Hayden wouldn't receive it, and to make a tender of it it would have to stay in the clerk's office so long, and then stand a suit over it. I think that was in the spring of 1865, along in April or May. I think the $200 was paid Hayden in 1864. I think his wife and family were present when the money was paid—I mean by his family his wife and children. Nothing was said at that time about applying this $200 towards the rent in case we couldn't raise the balance of the money. I think that receipt reads about in this:

Received of B. Dove $200, to be applied on the place purchased by me at sheriff's sale, known as Rachel Dove's donation land claim, and
signed Benjamin F. Hayden.

181 That is the way they read it to me. I can't read writing.
Hayden gave me that receipt voluntarily. I didn't ask him for it. I don't recollect whether the mortgage was read over by Mr. Hayden the day he drew it up.

Redirect:

Ques. 1. Is James Jones a friend or an enemy of yours?

Ans. 1. I consider him an enemy. He told me the other day not to speak to him. He and I are engaged in a lawsuit.

Ques. 2. State whether at time since 1864 you and Mrs. Dove, or either of you, have directly or indirectly made any propositions to Mr. Hayden to settle the matter by allowing him pay for his money and services out of the rent of the place, and for him to restore the land to her.

(Objected to as incompetent and immaterial.)

Ans. 2. Yes, sir. I sent Mr. Lawson to make such a proposition.

182 Recross-examination:

That was before this suit was commenced. It was between two or three years ago. Before the suit by my wife against Hayden in Polk Co. circuit court was commenced I sent Mr. Lawson to make that proposition. I author'zed him to make an amica'l' settlement. I authorized Mr. Lawson to tender him money if there was any coming to him. I did not send any money by Mr. Lawson. I could have raised some money. I don't know how much.

his
B. + DOVE.
mark.

Further hearing of this cause is adjourned until March 11, 1878, at the hour of 10 o'clock, a. m.

Upon this 11' day of March, 1878, at the hour of 11 o'clock a. m., appeared the complainants as heretofore, and the def'ts by W. H. Effinger, esq., of counsel, and examination of witnesses is resumed.

MORDECAI KENNEDY is called as a witness for complainants. Being duly sworn he deposes as follows: My name is Mordecai Ken-
183 nedy; age is 56 years; residence, Salem, Oregon, and by occupation a farmer. I am acquainted with Benjamin Hayden, def't in this suit. I am acquainted with the land claim of Rachel Dove. I had, to the best my knowledge now, conversations with Hayden in 1863, 1864, and 1865 about that land claim and about the business generally. Def't told me that he was attending their (Dove's) business for them. He told me that he had either bid the land in or got some one to bid in so that the old folks could have a home, could have their land—a chance to redeem it. I think in the spring of 1865 there was a man by the name of Ireland who lived neighbor to me, had come on from Iowa, and he was wanting to buy a place, and him and I went to Dallas, and Hayden and me went on down and looked at the Dove place, and Mr. Hayden asked $10.00 an acre. There was a verbal bargain agreed on at that price. In a short time this man Ireland sent word by me to Hayden that he thought he wouldn't take the
184 place. I told Hayden what Ireland said, and Hayden said it didn't make any difference. He said, "I say that land will be very valuable some time, down there so close to the river."

At that time I lived in Polk County, five miles north of Dallas, and Hayden lived in Dallas. That land is worth per acre now in my judgment $30 *per acre*. I think I would be willing to give that. Def't told me in conversation in 1864, I think, he had bid the land in or got it done, I don't remember which, so that they could have a chance to redeem their land. Then he stated about the time the sale was confirmed or a little after that Dove had gone over to cut the timber off, and that he had disposs'ed them. His language was, "I say the damned old rascal went to cutting off the timber and selling it, and I wouldn't allow it."

I had a talk with him in 1865, along there some time, in which he said, "I say, I wouldn't be afeared to swear that they are all dam'ed
185 fools." This was after they were disposs'ed and about the time there was a talk of the old lady's suing to get the land back again on the ground she was not in her right mind when she signed the mortgage. All I know about Benjamin Hayden's being the att'y of J. B. V. Butler about the time of the conversations above referred to, is that I heard Hayden and Butler talking together about the Dove land, and Butler seemed to be interested in some way as though he wanted Hayden to assist him. I couldn't state whether they were trying to get a mortgage from her (Mrs. Dove) or not. From the best of my recollection it seems that Butler was trying to get Hayden to have him (Butler) released in some way from his security. It appeared from my understanding of it that Butler was surety for Dove and wanted in some way to be secured. That is the best of my recollection.

M. KENNEDY.

Further hearing of this cause is adjourned until to-morrow, March 12, 1878, at 10 o'clock a. m.

W. B. GILBERT, *Examiner.*

186 Upon this 12' day of March, 1878, at said hour, 10 a. m., appeared the said parties as of yesterday, and examination of witnesses is resumed.

B. Dove is recalled to explain his testimony heretofore given in this cause. The witness is recalled by the complainants.

(The counsel for the defendants objects to the witness making any explanation or correction of his testimony after the interval of time that has elapsed.)

I want to say that I was mistaken about having a conversation with Mr. Dice. I had forgotten it. I had a conversation with him at the time I was going up to Dallas to court. I did say to him that I wished the Jones case was in as good a shape as the Hayden case, for that was in a court of equity and the Jones case was in the court of law, and I expected it would have to go into the court of equity before it was settled.

Ques. 1. State what, if any, circumstances has recalled this to your mind.

187 Ans. 1. It was called to my mind by my people telling me that I told them I had such a conversation with Dice when I got home from court. They told me this since I gave my testimony in this case.

Cross-examination:

I mean by my people my wife, my son, and daughter. They were not present when I had the conversation with Dice, but I told them when I came home from the Polk County court.

Redirect examination:

I expect this is the deed we gave to Manning. I can't read writing. I know we gave him a deed. I might tell by hearing it read. The deed was acknowledge' before Justice Irvine.

Cross-examination on the deed:

Ques. 1. Was any part of this $5,000 ever paid?

Ans. 1. I don't know whether it has been paid or not. I don't know from my wife whether any of it has been paid or not.

188 Redirect examination:

I recollect signing a deed with my wife to Chas. Manning. I don't know whether this is the deed or not. It was signed at Independence. I never made but one deed to Manning.

Complainants offer in evidence the said deed.

(Objected to as not proven.)

The deed I made to Manning was read to me. This deed presented to me has just been read to me, and to the best of my knowledge it is the same deed we executed to Chas. Manning. It was intended by that deed to convey to Manning the south half of the donation claim, or the wife's half.

Cross-ex.:

This deed was made and read over to me about four years ago. I forget the date.

The complainants again offer the deed in evidence.

(Objection is made as above.)

189 The said deed is filed herein, marked Exhibit B.

his
B. + DOVE.
mark.

G. W. Lawson is called as a witness for the complainants. Being duly sworn, he deposes as follows:

My name is G. W. Lawson; my age is 60 years; a lawyer by profession. I reside in Salem, Oregon. I was employed by Mrs. Rachel Dove in 1874 to take a case for her against Mr. Hayden, the def't in this suit, to recover her land claim—the land in dispute in this cause. In April, 1874, I wrote out a demand for her and served it by copy sent by mail upon the def't. I have the original demand, and make it a part of my deposition in this case, marked Exhibit A. About a week after I sent the letter of demand to Mr. Hayden he came to see me about it and we had quite a talk over the case. Mr. Hayden claimed the land to be his. He claimed that it did not make any difference about his being her att'y, because, he said, the land was put up 190 at public auction at sheriff's sale to be sold to the highest bidder, and he had just as good a right to buy it as any other man; that he gave her a chance to redeem the land and she didn't do it. He said he had offered her some sheep once to pay her back the $200 in gold that she had paid on it to redeem it, but she didn't or wouldn't take them. I don't recollect which word he used. He then told me that he would give her a coupl' of sorrel mares he had to pay her back that money, but if she took them she must make him a quitclaim deed for the land. He asked me to see them (the Doves) and see if they would take the terms he proposed. I done so and they refused, and no settlement was made.

Cross-examination:

I wrote the paper marked Exhibit A some time in the spring of 1874; I think in April. I made the interlineation on the 2d page at 191 the time I sent the *time I sent the* original notice. The copy I sent was a clear copy. I am certain I made the interlineation before the copy was sent. I wouldn't swear that the interlineation is in different ink, though it looks to be darker ink. I am willing to swear that I have not changed it since I sent the copy for service. There was something said about $200 that she had paid on account of redemption, but that was all she had paid, and that the time for redemption had passed. Mr. Hayden said that.

Ques. I asked you what you meant in your testimony direct, taken from memoranda furnished by yourself to the examiner, by saying that Hayden said in his interview that he gave her a chance to redeem the land and she didn't do it?

Ans. We were talking about whose claim the land was, and he claimed it because he had bought it at sheriff's sale, and he had given her a chance to redeem it and she had not done it. He also offered this as a reason why, if he was under obligations to her as attorney, that the obligation no longer existed.

192 Ques. Was not the whole of your direct examination taken down totidem verbis from a writ'en memorandum furnished by yourself?

Ans. It was by consent of def't's counsel. I am one of Manning's counsel*s* in this suit.

G. W. LAWSON.

Geo. H. Durham is called as a witness for the complainant. Being duly sworn, he deposes as follows:

I am acquainted with Owen Wade, late register in the land office at Oregon City, and Henry Warren, late receiver in the same office. I have seen them both write, and have frequently received communications from them. I am acquainted with their signatures, and believe the respective signatures purporting to be the signatures of Owen Wade, register, and Henry Warren, receiver, attached to this paper, purporting to be a donation certificate to the land claim of B. Dove and wife, are the genuine signatures of said Owen Wade and Henry Warren.

193 Complainants offer in evidence the donation certificate referred to.

(Objected to by counsel for def'ts as not proved, not being certified nor appearing to be the record of any department, a*s* as incompetent.)

The said donation certificate No. 4494 is filed in evidence herein, marked Exhibit C.

GEO. H. DURHAM.

Further hearing of this cause is adjourned until Friday, March 15, 1878, at the hour of 10 o'clock a. m.

W. B. GILBERT,
Examiner.

Upon this 15 day of March, 1878, at the hour of ten o'clock a. m., the complainant appears, as before, and the defendants appearing not, taking testimony herein is adjourned until half past one o'clock of this day.

W. B. GILBERT,
Examiner.

At half past one o'clock p. m. of this day the complainants appear, as above, and the examination of witnesses is resumed.

Geo. H. Durham is recalled as a witness for the complainants, and testif*ys* as follows:

On last Tuesday Mr. G. W. Lawson, of counsel for complain-
194 ant, handed me a paper purporting to be a receipt for the sum of

two hundred dollars, I believe, executed by the defendant to either Rachael Dove or B. Dove, and relating to the land transactions in controversy in this suit, as I understand it. I was under the impression that I deposited the paper, together with a memorandum of the testimony of P. C. Sullivan in reference to this paper and his conversation with the def't concerning it, as reduced to writing by H. H. Northup on Monday last, in our safe. On yesterday evening I searched for it in the office and at my residence thoroughly, and have continued my search during the forenoon of to-day, searching our safe and every desk in the office and at my house repeatedly, but I have not been able to find it, nor have I any idea where it can be.

GEO. H. DURHAM.

P. C. SULLIVAN is called as a witness for the complainants. Being duly sworn, he deposes as follows:

My name is P. C. Sullivan, aged 53 years, and am an attorney at law; reside at Salem, Oregon. About seven or eight years ago, at Dallas, in Polk County, B. Dove and wife placed the matter in
195 controversy in this suit in my hands with instructions to make settlement with the def't in regard to the land in question. I called the attention of Mr. Hayden to it shortly afterward, and he called at my office and talked the matter over with me. At that time I had in my hands among other papers a receipt for the two hundred dollars received of B.Dove, or his wife, or both, I don't now recollect . to apply on the land in question, which receipt was signed by the def't in this suit and was in his handwriting. I have often seen him write. I told Mr. Hayden that Dove's wife claimed the land as hers; that she also claims that at the time the land was sold at sheriff's sale he (Hayden) was acting as her att'y, and also at the rendition of the judgment or decree upon which the sale was made, and as such att'y he agreed to and did bid off the land at the sale for her and as her agent and attorney, and agreed to wait until she could raise and refund the money he advanced for the bid. In answer Hayden said that he was acting about that time as the att'y for Dove, and that he
196 agreed to bid off the land for her and give her a reasonable time to refund the money; that he did bid off the land, or had it done, and furnished the money, and that the receipt of which I have spoken and which I then exhibited to him (being the same receipt that was presented to me, and which I examined in this office on last Monday) was given by him for two hundred dollars received from her upon the land, and was received shortly after he had purchased the land at sheriff's sale and had paid the bid; and that he then intended if she should furnish the balance of the money for the bid, which amount I do not now recollect, he would her a deed back to the land; but that he considered that one year was a reasonable time, and I think he said that prior to expiration of the year Dove commenced to commit waste upon the land by cutting timber, and that he took the possession from him and had held it ever since, or words to that effect.

He also said that after what he considered a reasonable time
197 had passed for her to pay the amount of the bid or the balance of the bid, he then applied the two hundred dollars for which the receipt was given on account against B. Dove, the husband. I then asked him if he was then disposed to make any further settlement of the matter in relation to the land. He replied "Yes, I always have been and now am." He further said he had frequently offered her one or two hundred head of sheep if she would make him a quitclaim deed to the

land. I informed that that was not satisfactory, and he then proposed to arbitrate the whole question. I soon after saw my clients and they assented. I drew up a paper for both parties to sign to that effect, which paper was signed by both parties, but for some reason afterwards given by Hayden, that I don't now recollect, he refused to proceed with the arbitration and it never took place. I have no connection with this present suit, and never have had.

198 At the time first referred to in my testimony, I examined the papers in the suit in which the decree was rendered upon which her land was sold, and I then and there found the original mortgage given by Dove and wife upon the land in question, and according to my best recollection and I feel quite confident that that mortgage was in the handwriting of the defendant Hayden. The receipt of which I have spoken was in the ordinary form, and expressly stated that the $200 was received to apply on the land—or her land.

The decree I speak of was rendered in the case of one Emmons, county treasurer of Polk County, against B. Dove and wife, the suit being brought to foreclose a mortgage, as I understand it, given by Dove and wife upon her land to secure money loaned from the school fund.

P. C. SULLIVAN.

Complainants offer in testimony a certified copy of journal entry. The said paper is filed herein, marked Exhibit "D." The complainants offer in evidence a certified copy of journal entry of confirmation of sale. The said transcript is filed herein, marked Exhibit "E." 199

The complainants here close their testimony and rest their case.

Adjournment is taken until such day as the examiner may fix for further hearing hereof.

W. B. GILBERT, *Examiner.*

Upon this 16' day of April, 1878, upon motion of W. H. Effinger, esq., of counsel for def't, it is ordered that Thursday, the 25th day of April, 1878, at one o'clock p. m., be fixed for the further taking of testimony in this cause and examination of witnesses on behalf of the def't, and that notice thereof be given to the complainant's counsel forthwith, and that said hearing be had at the court-house in Salem, Marion County, Oregon.

W. B. GILBERT, *Examiner.*

Upon this 25' day of April, 1878, at one o'clock p. m., at the court-house in Salem, Marion County, Oregon, appeared the said pl'ff, by G. W. Lawson, esq'r., his attorney, and the said def't in person and by E. C. Bronaugh, esq., an' J. J. Daly, esq., his att'ys, and he'ring hereof is resumed.

200 *Defendant's testimony.*

Harrison Linville is called as a witness for def't. Being duly sworn, he deposes as follows:

My name is Harrison Linville; age, 64 years; live at Buena Vista, Polk County, Oregon.

I am acquainted with Mr. Butwil Dove and Mr. Hayden. With Mrs.

Dove I have only a slight acquaintances. I know where the land in controversy is located; that is to say, I know where the land is where Mr. Dove lived from about 1860 to 1865. I would think that that land would have been worth from $4 to $6 per acre in 1864. I don't know as I can answer the question more specifically than that. I have lived in Polk County some thirty years. There was a year or so in that time that I was out of the county.

Ques. State whether since you have resided in Polk County you have bought or sold any land within that county; and, if so, when and how often.

(Objected to as irrelevant, immaterial, and frivolous.)

201 Ans. Some time about 1865. I bought and sold land in that county between 1860 and 1865. I bought and sold two pieces of land. I don't know as I had any particular means for knowing the value of land near the Dove donation claim about that time. There was very little land sold then, but it sold when sales were made at about four to six dollars an acre.

Cross-examination:

I don't know by the metes and boundaries exactly how the donation claim of B. Dove was divided or located. I don't know as I could come near it. I have no definite recollection which half had the most improvements.

When I said land was worth from $4 to $6 per acre I meant taking land as it came. Good prairie land was not sold by itself separately, and I don't know what improved prairie land was worth then.

Ques. Were improvements, such as buildings and outhouses, on land then worth generally about what they cost in that neighborhood?

202 (Objected to as irrelevant, immaterial, and incompetent and not cross-examination.)

Ans. I don't know.

Ans. I sold a donation claim in Polk County about that time. I sold, I think, for eight dollars an acre.

Redirect examination:

I sold the donation claim partly for cash and partly in trade: about the third trade; it was a half section. It was all under fence; at least half under cultivation, and had a house which cost me about $3,000. It had also a very good barn. I think I sold it in 1863. It was ten or twelve miles from Dove's place.

Ques. Supposing one-third of the Rachael Dove half to be under cultivation and to be rich bottom land, one-third upland prairie not so good, and the remaining third upland brush and timber; considering the improvements upon it at that time, what was such a piece of land worth then?

(Objected to as incompetent and immaterial, and not a true description of the place.)

203 Ans. I don't like to answer such a question, because it has been some 12 or 14 years since, and my recollection of sales of lands is indefinite, and particularly to sort out lands by parcels; I don't know hardly how to put a valuation on it more than what I have already stated about lands in general. Lands were selling from four to six dollars; sometimes a little higher.

Recross-examination:

Ques. Supposing a piece of land close to the Wallamet River, having 50 acres rich bottom land cleared and under cultivation, situated within seven miles of the capital of the State, with 150 acres of upland prairie under cultivation, over 200 acres being under fence, with improvements and buildings costing $1,500; what would you consider such a place worth in 1864?

(Objected to as incompetent and immaterial, and not sustained by the evidence.)

Ans. I really don't know as I could answer that question and
204 go back to 1864 and say what I think such a piece was worth then;
perhaps such a piece of land would be worth more than $4 or $6 an acre.

Ques. Supposing the balance of such a piece was timber with brush; would ten dollars an acre be a fair price?

(Objected to as above.)

Ans. It might not at that time have been considered a very extravagant price. The difference between brush land then and brush land now is considerable. Brush land then was considered a nuisance.

H. LINVILLE.

James Jones is called as witness for the def't. Being duly sworn, he deposes as follows:

My name is James Jones; age, 54 years; reside in Polk County, Oregon; I am acquainted with Bethuel Dove.

Ques. 1. Did Bethuel Dove, in the fall of 1864, near the house where he then resided in the road out by the orchard on the place in controversy in this suit, say to you and your wife, and in your presence, that
Hayden, the def't in this suit, had bought the land controversy
205 in this suit, and paid for it, and that he was satisfied that he would
never get it back, but that he had to tell the old lady—meaning his wife—so to pacify her, or words to that effect?

Ans. It wasn't expressed exactly that way. It was in the house Mr. Dove told four of us there—Bill Tillotson, Geo. Boulder, myself and my wife—that his land was all out of his hands and he never expected to get it back, but he had to tell Rachael that he would, to keep her pacified.

(Objected by pl'ff's counsel as not responsive to questions of respondant.)

I know the land in controversy in this suit. This conversation was in the house on the land in controversy in this suit. I have know' Mrs. Dove's land since 1863. I wasn't made acquainted with the value of lands in 1864, only in my own dealings. I sold 160 acres for five hundred dollars, and 160 acres for five hundred dollars. The land I bought joined the Rachael Dove claim. I bought it in 1863. There was an orchard on the land. I bought some few rails, a shed-barn, and a log-
house. The improvements were about equal to the improve-
206 ments on the Rachael Dove's land in 1864. She had a better
house, but no barn. That 160 acres of mine, taking all things into consideration, was just about equal in value to Rachel Dove's half of donation claim in 1864—I mean per acre.

In 1864 there was hardly any fence on her land. Sheep ran all across her land. The bottom land on her claim was not fenced in in 1864. I knew the land in 1865, when Clarke rented it. I don't think was any more fencing on it in 1865 than in 1864. The Clarks cultivated the bottom land; his crop was protected by Mrs. Fudge's line fence—an old slab-fence; and on the lower part was protected by my fence. On the east side it was protected by the slough, and on the west side by an old fence I had helped to straighten up; on the south by the

Fudge fence, and on the north by my fence. The house on Rachel Dove's place was worth I couldn't say how much. It was a large frame house. There was no barn on her land in 1864; it had fallen down before 1863. There were some old rotten timbers there, but no 207 barn. The house was pretty well delapidated in 1864. There was a little orchard on one side and a little orchard on the other side; in one of them there were six or seven trees, and on the other about a dozen. There was about forty acres of land on her place in 1864 that had been ploughed. It was in the bottom. I guess there are now 200 acres of land on that place that have been cultivated. There is now a chunck of a barn on the place. I believe the house has been repaired since 1864. I believe new sills have been placed under it. The land is all fenced in now except that slough part. I guess there is about the same number of trees in the orchard now as in 1864, though they are more thrifty now.

Ques. About what was the rental value of land in that neighborhood in 1864, of the character of Rachel Dove's land as to quality and improvements at that time?

Ans. I don't know as I can hardly tell as to money rent. I rented land when I first went down there and gave one-fourth of the 208 crops as rent; wheat and oats were worth, I don't recollect how much at that time. That forty acres of ploughed bottom land on Mrs. Dove's land in 1864 would have raised from 30 to 40 bushels of wheat and from 50 to 75 bushels of oats. If I recollect right I don't think there were any wild oats on that 40 acres to amount to anything. I don't know as I can hardly tell what is the value of the improvements that have been put upon this land since 1864. I should think they would be worth seven or eight hundred dollars.

Cross-examination:

The tract of land I bought adjoining the Dove claim had about 75 acres of prairie, 43 acres of rich river bottom cleared; very little fencing; not any under cultivation. It had a log house—only one room. The slough ran about two points west of south and ran across the Dove claim diagonally, and ran by my place. I had to go across Mr. 209 Dove's land to get to my prairie land, on account of this slough. I had another way of getting there by the Perry place.

Do you state under oath positively that there were only 40 acres of land under cultivation on Mrs. Dove's part of her donation land claim in 1864?

I state positively that I don't think there were over 40 acres under plough then. I didn't state pos'tively there were over seven or eight trees in one part of the orchard and a dozen in the other, but I think that was about the way it was. There were not as many as seventy trees in those two orchards in 1864. I don't think there was so many.

Have you a lawsuit now pending with B. Dove?

Ans. I have. He and I are not on speaking terms.

Redirect:

The north half of the Dove claim was the best in 1864. I should think it was worth from six hundred to a thousand dollars the most.

110 Recross-examination:

My children own the north half of that donation claim at this time. I am their *gaur*dian.

JAMES JONES.

R. R. BOOTHBY is called as a witness for def't. Being duly sworn, he deposes as follows:

My name is R. R. Boothby; am 66 years of age; I reside in Polk Co.; am a painter; I went into Polk Co. in 1849, and came to Salem in 1850; went back to Polk Co. in 1854, then went east of the mountains 1862, and from that time until four years ago I was east of the mountains most of the time. I was residing in Polk Co. in 1859. I held the office of justice of the peace in that county in 1859. I know the handwriting in the body of this instrument handed to me. I wrote it. It is a mortgage of the Dove donation claim, a portion of that claim.

Def't offers in evidence the said mortgage.

211 (Objected as incompetent and not the best evidence, and irrelevant and immaterial.)

The said mortgage is filed herewith marked Exhibit.

The name Reason R. Boothby, J. P., signed to certificate of acknowledgement of this mortgage is in my handwriting. That acknowledgement was taken by me in March, 1859, at Mr. Dove's house. There were present Geo. Bolter and Theodore Ingalls, B. Dove and his wife, & myself. I wrote the mortgage at Mr. Dove's house at the time it was signed. I wrote the whole of it, except the signature of Geo. Bolter and Theodore Ingalls. I think Mr. Hayden gave me that blank; I was out of blanks at the time, and I got that with seven others. I took it to Dove's house as a blank, and filled it up after I got there. The def't was not at Dove's at that time. I don't recollect how long before that it was that Hayden gave me those blanks. There was no conversation with Mrs. Dove at that time with reference to the nature of the mortgage, more than I read the mortgage and ex-
212 plained the matter to her; that is, I read it to her and told her what the contents were.

I considered I was very particular in giving her the nature of it. Geo. Bolter is now at Humbolt, Cal., I think, and the other is at Walla Walla, W. T.

The signature of B. R. Boothby, one of the attesting witnesses, is in my handwriting.

(Objected to, because the instrument is not duly proved.)

Rachael Dove and Bethuel Dove both signed that instrument that day in my presence.

(Objected to as not two witnesses.)

Cross-examination:

The acknowledgement is in my handwriting. The writing on the first page was written by me. I have seen Mr. Hayden's handwriting several times. The handwriting on the first page does not resemble the handwriting of the def't, I think.

The filling in of the first part of the mortgage was done at Mr. Dove's. Mr. Bolter, Mr. Ingalls, and Mrs. Dove, and I think Mr.
213 Dove were, there. Mr. Hayden had requested me to go up there and take the mortgage.

The only conversation I had with him was that he came to me to get me to go there to take the acknowledgement of this mortgage. I am positive that I wrote all that filling in and description of parties and land. Mr. Hayden gave me no reason for taking this mortgage. I knew at the time there were embar'as'ments, and I knew he was attending to their business. He furnished me the blank at Eola, in Polk County, the day before, or may be two days before, the mortgage was executed.

At the time I went to the house there were no papers produced from the cu*b*board of Mrs. Dove's purporting be a mortgage. No paper*pers* were produced. It would be pretty hard for me to give the language I used in explaining the matter to Mrs. Dove. I recollect reading the mortgage to her carefully, and explaining to her the contents, and another thing I recollect, telling her the consequence if it was neglected.
I recollect that. I don't know that I told her that Mr. Hayden
214 sent me. I went there with a blank, and I told her that I had
come to take the mortgage, and I think I said at the request of Mr. Hayden. I don't recollect where I got the description of the land. To the best of my recollection Mr. Hayden gave me the description at home before I went. Mrs. Dove signed the mortgage cheerfully, without hesitation. She said nothing about fearing that her land would be lost. I said nothing to her to *e*nduce her to sign the mortgage. I couldn't see but what her mind was made up to sign it. She appeared to be cheerful about it. I don't recollect saying that day that I had taken another acknowledgement that day.

I wrote the names Bethuel Dove and Rachael Dove. They put their crosses there. They held the pens themselves. I showed them where to put them. Geo. Bolter wrote the name Geo. Bolter. Theodore Ingalls wrote the name Theodore Ingalls. The ink used in writing the first page and signing the names was all out of the same inkstand.
That is the only mortgage I made in that case.
215 I was not well enough acquainted with the land in controversy
to testify as to its condition or value. I reside in Eola.

Redirect examination:

I don't recollect whether def't told me to go down at Dove's request or at his own. I knew he was doing business for Dove then; but I understood—I was under the impression that I went on behalf of Dove. Dove lived about two and a half miles from Eola then. Hayden lived then on his farm, a mile and a half from Eola. Eola would be on his way home from the Doves. There was nothing said at Dove's that day about Hayden having drawn up any other mortgage for them. I wouldn't be certain whether I got this description out of the land-office papers which Dove then had at his house. I am not certain that Hayden furnished me the description, though it runs in my mind that he did. He furnished me the blank, I think, the day before.

216 Recross-examination:

Hayden's farm was very near north from my place. Dove's place was very near south from Eola.

R. R. BOOTHBY.

ISAAC N. BUTLER is called as a witness for def't. Being duly sworn, deposes as follows:

My name is Isaac N. Butler; my age is 46; live in Polk County, Oregon; I have lived there about 25 years. In 1864, I believe, I was sheriff of that county; I know the Rachael Dove claim, but don't know much about the boundaries.

Ques. 1. State whether in 1864 you sold that land as sheriff.
(Objected to as not in issue, & irrelevant.)

Ans. 1. I sold it while I was in office; but in what year I couldn't state This instrument now handed to me is a sheriff's deed written and signed by me. I find from looking at this deed that I sold the land in
1864. I don't recollect now whether the def't was present at the
217 sale or not. I recollect that a few days before the sale he told

me that he expected to be away on the day of the sale, and if he was away he would have Mr. Baldwin bid for him at the sale. I don't recollect who bid the land in at that sale.

Defendant offers in evidence the said sheriff's deed. It is filed herewith, marked No. 2.

(Objected to as incompetent, not being duly proved, and not in issue.)

I sold a good many pieces of land about that time.

Ques. State whether at that time the price this land brought bore the same proportion to its value that the price of other lands sold by you as sheriff bore to their values about that time.

Ans. I think it did. All the lands I sold about there sold remarkably low. The improvements then were very different from what they are now on this Rachael Dove land. The fences were down almost all over the place. In fact, there was very little fence then. The house
was very much out of repair and dilapidated. It is in better fix
218 now. There is considerable more land in cultivation, and more
fencing, and I think the house is in better repair.

Cross-examination:

The fences in 1864 were down, and in fact there were but few rails there. Stock was going in and out. Now, the fence is in better condition. The house has not been painted; but window-lights have been put in and the house repaired. It was during the winter-time, along in the wet season, that I saw the fences down. I could not say who bid off that place at sheriff's sale. I don't recollect who was living on the place in 1864. It was sold at Dallas. I saw the place in 1864. I went by the place every two or three weeks. I think the fences were put up better then; but they were low and poor. I don't recollect whether Hayden paid me greenbacks or coin. I think it was
greenbacks, for there was nothing else paid on executions then;
219 I couldn't say now what they were worth. I think in 1864 they
were about 70 or 75 cents. I couldn't say whether they were as
low as 50 cents in that year.

If greenbacks were worth 50 cents on the dollar then, was the $612.50 anything like the fair value of those premises so sold, considering the improvements and all, at sheriff's sale?

(Objected to as immaterial and incompetent.)

I think it was not the real worth of the land, but at the same time it was about on an equality with other land that I sold about the same time.

Redirect examination:

The greenbacks were not discounted any in *in* entering satisfaction of that judgement, but entered dollar for dollar. I think the sale was not made upon the day advertised, but was postponed; I don't recollect for what cause.

Recross-examination:

I don't recollect whether this postponement was made in order to give time to see whether final proofs had been made at the land office at Oregon City. It might have been on that account.

220 Redirect examination:

I have no recollection of anything being said about final proofs by me or any one at that time.

J. M. BUTLER.

J. B. V. **Butler** is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is J. B. V. Butler; am 68 years old; live in Polk County, Oregon.

I am acquainted with Bethuel Dove and Rachel, his wife. I am acquainted their donation land claim in Polk County. I owned one-half of it; the north half. I purchased it at sheriff's sale, I think, in Jan., 1859.

(Objected to irrelevant and incompetent.)

I paid two dollars per acre.

(Objected to as above.)

I considered the north half the best half at that time, better than the
south half. I don't recollect how long I owned it. I owned it several
years. I think I owned it three or four years, may be longer.
221 I know John B. Springer, I think; I don't know of his ever
offering me $3,000 in cattle, horses, &c., for that land. I have no
knowledge of his ever offering me anything for said land.

Were you acquainted with the value of lands in the vicinity of the Dove land, in 1864?

(Objected to as irrelevant and incompetent.)

Not much. All the acquaintance I have is by the price I sold that land for. I think I sold it for $2,000, at private sale, part down and part on time; don't remember how much. I shouldn't think $1,250 was a fair price for Mrs. Dove's land sold at sheriff's sale in 1864. I didn't want the land. I knew of the sale.

The improvements on Mrs. Dove's land were very poor in 1864. Now
there is a good deal of fencing on the place, and the house and things
around it are improved. I know Mordicai Kennedy. I have no knowl-
edge of any conversation in 1865 between me and Mr. Hayden, at
222 which Mr. Kenneday was present, about my Butler having any in-
terest in the land or wanting Hayden to assist me. I never had
any interest in the south half of that claim. I had claims against Dove
for money about that time. I never talked with Hayden about getting
a mortgage from Dove to secure me in regard to those claims. I think
I was not security in any way for Dove in 1865. I never, that I knew
of, had any conversation with Ben. Hayden about getting a mortgage
for me upon Mrs. Dove's land to secure me as Dove's security or surety.

I was security on Griswold' demand against Dove, but I think that was settled before 1865.

I never tried to get Dove and his wife to give me a mortgage on this south half of Dove donation claim to secure me.

Cross-examination:

I bought the north half of Dove's claim at sheriff's sale. There was
a space of bottom land on the north half larger than the bottom
223 land on the south half. I bought it at $2 per acre. I sold for
$2,000. I don't know as the title was considered doubtful at the
time I bought it. If in 1864 I had owned the south half of that claim,
I expect I wouldn't have taken $650, gold coin, for it.

(Objected to as immaterial and incompetent.)

If I had owned the south half of that claim in 1864, I don't think I would have valued it at $10; I would have taken less than $2 per acre. I was merchandising then and didn't want land.

(Objected to as above.)

Ques. Would you or would you not believe Mr. Kenneday under oath?

(Objected to as incompetent, immaterial, and not cross-examination.)

Ans. I have no reason think that he would swear to a lie. I never lived neighbor to him. I was surety for B. Dove in the suits of Griswold against him in 1858 and 1859, somewhere about that time.

(Objected to as above.)

Ques. Did you, in 1858 or 1859, solicit Mr. Hayden to procure or try to procure from Dove and wife a mortgage to the school fund to
224 raise $1,500 or some sum to pay off the liability of B. Dove to Griswold, for which you were surety?

(Objected to as immaterial and not cross-examination.)

Ans. It is a good while ago. There is one point which I remember well. After the sale of this north half which I purchased I was told by Sheriff Holman that Dove was going to get money from the school fund, and mortgage the south half to get money to redeem the north half, and was going to deed it to his son. I have no recollection of trying to get a mortgage from Dove & wife to pay off liability to Griswold.

Ques. Was Mr. Hayden your att'y or counsel in the suits of Griswold vs. Dove, in which you were surety for Dove?

Ans. When I went surety I think Mr. Hayden came with Mr. Dove to me and Mr. Hayden told me it was only security for costs on
225 appeal, but it proved to be that I w*ou*s bound in the whole sum, judgement as well as costs. I would suppose he was Mr. Dove's att'y at that time, not mine. I think he was not my att'y.

Ques. Was he not attending to your interests in that matter at that time?

(Objected to as leading.)

Ans. I think if he was it was poor counsel for me at that time.

Ques. Did you or did you not derive any benefit from Mr. Hayden's services in procuring that mortgage from Rachel Dove upon her land?

Ans. I think there was a portion of that paid over to Griswold. I don't remember how much. Mr. Hayden was friendly, and Mr. Dove also, at that time. I don't know that he was my attorney. It is very probable I might have counseled with him. Mr. Hayden was my att'y in legal matters in 1858 and 1859, and before that in a good many cases.

226 (Objected to as immaterial.)

I considered him my friend.

Ques. Did he procure this mortgage from Mrs. Dove for your benefit?

Ans. As I remember there was a portion of it used for that purpose.

(Objected to as above.)

I understood that the amount paid upon the Griswold judgement was about $1,000. The money didn't go through my hands at all. I sold a half section to Hombuckle some time about then.

(Objection.)

I don't remember what I got. I got a lot of war scrip. I wouldn't pretend to say whether it was $3,000 or less. I judge it was somewhere in that neighborhood, from $2,000 to $3,000. It was the same that I bid off at the Griswold sale.

(Objection.)

Ques. Do you understand or not that the $1,000 obtained by Mr. Hayden on this mortgage given by Mrs. Dove, and which was in
227 gold coin, was paid to Wm. Griswold upon his judgement against

B. Dove and went for your benefit that far in relieving you as security for B. Dove in case of Griswold vs. Dove?

(Objected to as incompetent and immaterial.)

Ans. The amount I am not certain, but whatever was paid was paid to relieve the judgement that amount.

Ques. Did Mr. Hayden act as your friend and att'y in procuring that amount for your relief in the premises?

(Objected as assuming that Hayden procured the money, and as incompetent and immaterial.)

Ans. I don't know as he was my att'y; but we were friendly at that time.

Ques. Did he speak to you, or you to him, about the matter before it was done; and, if so, what was said?

(Objected to as incompetent and immaterial.)

Ans. I wouldn't think strange if we talked about the matter,
228 but I don't remember what was said. I have no doubt but what
it interested me to get rid of that Griswold matter. I don't think I counseled him to get the mortgage made. Mr. Dove had as much anxiety as any one to get rid of that judgement, and of course I wanted to get rid of it. I can't remember now any special talk, though I should judge I had an anxiety to get rid of the judgement.

Ques. Was or was not Mr. Hayden before the execution of that mortgage your general and confidential adviser & att'y?

Ans. Yes; and for several years before I was in the habit of doing business under his advice and direction—he was my general attorney. I supposed him to be the general att'y of B. Dove the same as was mine.

Redirect examination:

I offered the north half of the Dove claim something like two
229 years at $2,000 before I could get that price. I don't recollect
what kind of a deed I made. I should think the north half was worth more than the south half in 1864. I would rather have it of the two. I don't know of Hayden having anything to do with procuring that mortgage from Mrs. Dove only from hearsay. Hayden might have toldme or might not.

At the time I sold that land to Hombuckle war scrip was worth from 30 to 50 cents on the dollar. I don't remember how much of the price of that land I took in war scrip. I realized out of that war scrip, if it was $3,000, about $800 or $1,000. I think I got it about 1861. I don't remember when I sold the land to Hombuckle. I bought the Hombuckle land at sheriff's sale and paid $2.00 per acre.

Recross-examination:

I didn't realize about $6,000 out of that war scrip, nor any such sum.
I got about $800 or $1,000. The land was Dove's land, sold on
230 execution in favor of Griswold, but not part of the donation
land claim of B. Dove and wife.

J. B. V. BUTLER.

Adjourned until April 26 at nine o'clock a. m.

W. B. GILBERT, *Examiner*.

Upon this 26 day of April, 1878, at nine o'clock a. m. appeared the said parties as of yesterday, and hearing hereof is resumed.

A. H. Simpson is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is A. H. Simpson; am 34 years old; live in Polk County, Oregon. I am acquainted with Bethuel Dove and Rachael, his wife; have known them from my childhood. I know the def't. I know the land in controversy in this suit.

Ques. 1. In 1873 did you have a conversation with Bethuel Dove
231 about the purchase of this land by the defendant; and, if so,
what did Dove say about it?

(Objected to as irrelevant and incompetent.)

Ans. As to the time, I am not positive whether it was the last of 1873 or the first of 1874. He said that Hayden had bought the place. I was talking with him about the land and told him it would be valuable now, and if he owned it yet. He said he didn't know but what he might get it yet. I asked him if Hayden didn't have an undisputed title to it. He said that Hayden had bought it at sheriff's sale, but he didn't know but what Hayden would let him have again, as he was doing some business for him. I asked him if he had tendered Hayden the money. He said no, he hadn't. I asked him if Hayden had promised to let him have it back. He said no, he hadn't promised, but as Hayden was doing business for him he thought he would let him have
it back. He said, in connection with that, he had been unfortu-
232 nate and broken up, and he knew it was no use to offer Hayden
money as he wouldn't take it.

I don't know as there was any established price per acre for land in 1864. It was very low there in Polk County about that time.

I was acquainted with the land in controversy and the improvments upon it in 1864.

Ques. Considering the land and the improvements, state whether you think $1,250 was any where near a fair valuation of it at that time?

(Objected to as leading.)

Ans. I think there were other lands equally as good that sold that cheap, sold at both public and private sale. I remember some land sold at private sale, that sold that cheap.

Ques. State what in your opinion was a fair price for the land in
controversy, considering the improvements at cash sale in 1864.
233 Ans. It is my opinion considering the way other lands rated,
that $1,250 would have been a fair sale—a fair value. The improvements now differ in most respects from the improvements on the land in 1864. There is a good deal more fencing, a great deal more land broken up. There is a small barn now on the place. Those are the principal improvements. The orchard is about the same, and the house has perhaps been repaired some.

I am a farmer by occupation. I am to some extent acquainted with the value of such improvements on land as fencing, breaking up, &c. The improvements that have been put upon the place since 1864, if the whole fence belongs to the place, is at least $1,200 or $1,500. Whether this fence belongs or not, I should say the improvements at least amount to $1,000 since 1864. There was no barn on the place in 1864. There was an old shed or frame of a barn rotted down. I wouldn't consider it worth anything.

234 Cross-examination:

I don't remember exactly when I had this conversation with Dove. If it was in the fall of 1873, it must have been as late as October. It was while I was living on a farm near to Dove's place.

A. H. SIMPSON.

S. C. DICE is called as witness for the def't. Being duly sworn, he deposes as follows:

My name is E. C. Dice; am 62 years old. Live in Polk County, Oregon. I am a farmer. I have resided in Polk County since the spring of 1847, with the exception of two years. I know the land known as the Bethuel and Rachel Dove donation claim in Polk County; I live about a mile and a quarter from that land. I have lived there since 1847, with the exception of two or three years I was at Walla Walla in 1870 and 1871.

I was some little acquainted with the value of land and the
235 prices at which it was selling in my neighborhood in 1864.
Either in the fall of 1863 or the winter of 1864, I bought 22 acres on the island near where I lived. It was prairie bottom land—overflowed land. All the bottom land on the Rachel Dove claim is subject to overflow. I bought this 22 acres at private sale; I paid $4.00 an acre. I would consider that bottom land about equal in value with the Rachel Dove bottom land.

There were no improvements on that 22 acres.

There was a piece of land east of me that Wm. Jones bought about that time; I think it was 40 acres. It was bottom land. I think it sold for four dollars an acre. There were no improvements on it. There was a half section sold about near that time, right north of me. Mr. Hayden bought it of Jno. T. Davis at private sale.

He paid five hundred dollars for the half section; that is my
236 understanding. That half section joins the widow Fudge's place,
that lies between me and Mrs. Dove's place. It don't touch the Dove land. It may corner with it on the northwest corner. That half section was prairie upland with a good deal of grubs.

Considering the quality of Mrs. Dove's land and the improvements on it in 1864, I am not well enough acquainted with the improvements to put a cash valuation on it at that time. Supposing all her land to have been unimproved, I would say that all the bottom land on her place was about equal in value to that that Jones and bought, but there was more brush and timber on this half section I spoke of of upland prairie than there was on Mrs. Dove's land, but the farming land on that half section is as good if not better than Mrs. Dove's land as there is not so fern on it.

In 1864, I would say, this Davis half section had more upland prairie farming land on it than Mrs. Dove's land; to break up that
237 bottom land is worth, I would say, about two dollars and a half
per acre.

I couldn't say pos'tively how much of Mrs. Dove's bottom land was broken up in 1864; on the side west of the slough, I would say about forty acres.

Besides ploughing this bottom land we generally have to do some grubbing to clear it for cultivation, here and there a scattering grub.

I didn't know then nor I don't know now how much partnership fencing there was on the place in question; I have not been over the place in 6 years.

I can see by going by that there is a good deal more ploughed land there now than in 1864.

There has been new rails hauled on and the fence repaired. In 1864, Mr. Dove had been to the mines and a flood had taken off some of the fencing; the fences were then in bad condition.

Ques. State whether on the first Monday in December last, at
238 your house in Polk County, in the presence of yourself and your

wife, Minerva Dice, Bethuel Dove said you or one of you, that if his suit with James Jones was in as good a fix as his suit with Ben. Hayden he (Dove) would be satisfied, or would gain it, or words to that effect.

Ans. It is all correct with the exception of saying "that he would gain it."

Cross-examination:

I know it was the wife's part of the Davis donation claim that Mr. Hayden bought. As to there being any dispute about the title I didn't know of it. The title appeared to be in Mr. Davis and his daughter; it was not understood at the time, so far as I know of, that Mr. Hayden was only buying the life estate of Mr. Davis; the claim belonged to Davis and his wife; the wife died and left an heir, and then the place belong to Davis and his daughter.

E. C. DICE.

239 B. F. BONHAM is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is B. F. Bonham; my age ; I reside in Marion County, and an att'y at law.

I am acquainted with P. C. Sullivan; I have known him since 1863 or 1864; he has resided about the first two years that I knew him at La Grande, in Union County, Oregon; for the last twelve or fourteen years in this county and in Polk County; I am acquainted with his reputation for truth and veracity in the neighborhoods in which he has resided in Polk County and in this county.

I might say that for a number of years past, the last 12 or 13 years and up to the present time, I have regarded his reputation for truth and veracity as bad; I mean his reputation as considered by the people; I have conversed about it.

240 Cross-examination:

His business has been the practise of law since I first knew him. He has practised in the various State courts of Oregon and inferior courts of the State. (Objection.) I have no personal knowledge of his practising in the United States courts. He is reputed to have what is regarded as a disreputable practice, in a certain line of business, in the United States circuit and district courts for Oregon.

Redirect:

I mean by say' he had a disreputable practice, it was very generally understood that he has been engaged for some years past in what the people here regard as a blackmailing practice, carried on by obtaining transfers of title to a son of his, who is alleged to be a non-resident of the State, which it is supposed by the people was done for the purpose of divesting the State courts of jurisdiction, and compelling per-
241 sons with whom he is engaged in litigation about land titles to be subjected to the increased expense, trouble, and annoyance of defending their titles away from their homes, so as to compel*l* them to compromise with him.

Recross-examination:

I know nothing personally about his success in gaining such suits. I understand that he gained the suit against Settlemin, although I don't know that that case is finally determined.

Redirect:

He is said to have been engaged for a number of years, and had some assistants, in the carefull examination of records of conveyances and of records of judicial sales, in this county particularly, for the purpose of finding some technical or other defect in the record evidences of title, and having discovered such a defect he is generally reputed to have been in the habit of writing letters to heirs on grantors of land, who might claim the land they were divested of, and offering to
242 give them a share of the lands if he should succeed.

Recross-examination:

If Mr. Sullivan had interest in a cause directly or indirectly I would not say in such a case I would not believe him under oath.

(Objected to as incompetent and immaterial.)

B. F. BONHAM.

T. M. THOMPSON is called as a witness for the defendant. Being duly sworn, he deposes as follows:

My name is T. M. Thompson; am 50 years old; I reside in Salem, Oregon. I am acquainted with P. C. Sullivan. I have known him ten or fifteen years. During the time I have known him he resided on the Yamhill River, Polk County; then at Dallas; then here in Salem. I think he has been here in Salem about three years—somewhere about there. I resided in Dallas, and was a close neighbor to him the whole time I knew him, excepting the time he lived here at Salem and
243 the time he lived on the Yamhill. I moved here just about six
months ago. I am acquainted with the reputation for truth and veracity of P. C. Sullivan, both at Dallas and at Salem. I have heard very few people speak well of him. His reputation for truth and veracity those places I should regard as bad.

Cross-examination:

My opinion of his reputation is partly based upon his getting up these land suits, but that is only one ground of it.

T. M. THOMPSON.

H. N. V. HOLMES, being called as a witness for def't, is sworn, and testifies as follows:

My name is H. N. V. Holmes; am 64 years old; reside in Salem, Oregon; I claim residence in Polk County, where my farm is. I am somewhat acquainted with P. C. Sullivan. I have know' him some thirteen or fourteen years. Part of the time I think he lived, *I think*, near Sheridan, then at Dallas. He lived six or seven years at Dallas, then he moved to Salem. I am acquainted with his reputation
244 for truth and veracity both at Dallas and at Salem. People
have generally been talking about him. I don't think I ever heard a good word spoken of him. His reputation for truth and veracity in these neighborhoods where I have known him has been bad.

Cross-examination:

All the conversation I have ever heard has been about his general character in business of truthfulness and veracity. I suppose these lands suits have had some effect in creating public opinion; but long before he was engaged in them, or I ever heard of his being engaged in them, his character was the same.

H. N. V. HOLMES.

J. I. Thompson is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is J. I. Thompson. My age is 51 years. I live in Salem, Oregon.

I resided in Polk County from the fall of 1858 until Oct. last.

I was county clerk of Polk County from 1866 until 1870.

245 I am acquainted with P. C. Sullivan. I have known him since 1863. We first resided on Salt Creek, in Polk County, next close to Sheridan, Polk County; then in Dallas; then at Salem, Oregon. I am acquainted with his reputation for truth and veracity in the neighborhoods where I have known him. That reputation is not very good.

Cross-examination:

If he was called as a witness in a cause, and had no interest either way, I would hate to say I wouldn't believe him under oath. I would hate to say that of any man.

J. I. THOMPSON.

E. A. Graham is called as a witness for defendant. Being duly sworn, he deposes as follows: My name is E. A. Gramham; am 44 years old; live in Salem, Oregon *Oregon*. I first moved to Polk County in 1860; lived there till '62; then moved away, and came back to the county in 1866. I am acquainted with P. C. Sullivan. I have known him since 1864. He then lived near the Yamhill River. I came 246 down from east of the mountains to buy some cattle. He was then farming.

He next resided at Dallas. He resided there some four or five years, and then came over here to practise, leaving his family at Dallas. I am acquainted with his reputation for truth and veracity among the people where he has resided in these several neighborhoods. It is not good.

Cross-examination:

Mr. Sullivan got up excitements there in Polk County about lands and patents. I got Mr. Sullivan to look after my patent, and supposed he was attending to it all right, and the first thing I knew he was buying all the heirs out, or proposing to buy them out, getting quitclaim deeds. That is the only trouble I ever had with him.

E. A. GRAHAM.

R. A. Ray is called as a witness for the def't. Being duly sworn, he deposes as follows:

R. A. Ray is my name; am nearly 60; live in Polk County.

247 I am somewhat acquainted Bethuel Dove and Rachel, his wife.

I am acquainted with the donation land claim of B. Dove and wife, in Polk County. I have known it since 1854. I can't say about its condition in 1864. In 1862 I was there. The freshet had washed all the rails off the bottom. There was some fencing on the prairie land west of the bottom. I don't know whether fence had been put back on the bottom in 1864 or not. There was a fence on the line between Dove and Fudge and a fence on the line between part of Jones' land and Dove. The fencing west of the house that I saw in passing was ordinary fencing; nothing extra. At the time I went there in 1862 I didn't know where the line was, but taking the fence afterward put there as the line fence, division fence, I would say there was cultivated land on Rachael Dove's half in 1864 to the amount of thirty or forty acres.

The improvements now with fencing, building, and all, are equal
248 to the improvements 1864; the fencing is much better; and I
understand a barn has been built on the place, and there must
be a quarter of a section there now under cultivation.

I couldn't say what the value of the improvements on the place since 1864 would be.

This Dove land is very near ten miles from Dallas. It is very near southeast from Dallas—a little south of east.

I was a very littl' acquainted with the value of land there in 1864. Land was pretty low; it went up and then went down again. In 1862 to 1864 it was very low. After the freshets in 1862 lands on the bottom particularly depreciated.

Cross-examination:

I don't know as the depreciating of bottom land would raise the value of upland prairie. It might have something to do with it.

I think, before 1864, there was a lane, a space not fenced, between
Fudge's place and Dove's place. I am only guessing at the
249 amount of land in cultivation, when I say it was 30 or 40 acres.
I wasn't over it. From the lane where I passed my supposition
was I could see to the end of the broken land. I don't know that
Mr. Dove raised a large amount of wheat on the Rachael Dove upland
in 1861 or 1862.

Mr. Dove had a barn there when I first knew the place, but I think it was not there in 1864. There were a few trees there; a small orchard.

R. A. RAY.

R. DOTY is called as a witness for the defendant. Being duly swron, he deposes as follows:

My name is R. Doty; my age is 40; I live in Polk County, Oregon.

I am acquainted with the Rachael Dove donation land claim in Polk County.

I have known it since about 1862.

In 1864 there was, to the best of my knowledge, on the place an un-
completed house, and about 25 acres of land in the bottom under culti-
vation and about 25 or 30 acres of upland under cultivation.
250 There might have been more of it that had been under cultiva-
tion, but I don't think there was at that time.

There was very little fencing on it at that time. I am not positive whether there was any fencing on it; there was a fence between this land and Fudge's, on the other side there was no fence.

On the slough side there was no fence except on the side next to the road.

Taking the present improvements, if I wanted the place, I would rather have it by $800 or $1,000 than as it was then.

My occupation was farming up to about 1860. I was raised on a farm.

The rental value of that place in 1864, considering its condition, would not be over $100.00 a year. There was plenty of land to rent then and rent was cheap. Plenty of places rented for one-fourth of the crop. Wheat and oats, as a general thing, about that time were worth, wheat about 50 cents a bushel, and oats from 20 to 25 cents.

That upland prairie would produce on an average 20 bushels of

251 wheat, and about 25 or 30 bushels of oats. I don't think oats would have averaged over 25 bushels to the acre.

That bottom I don't believe was as good as common. It was wet, and you couldn't get it in early. I wouldn't put the average production of wheat on the bottom at over fifteen bushels, and oats about the same.

I was tolerably well acquainted with the prices of land in that vicinity in 1864.

Such lands as Rachael Dove's with the improvements, in 1864, I don't believe could have been sold at over five dollars an acre. At forced sale it wouldn't have brought that much.

I know Lownsend Waller; he is my brother-in-law. He resides at Monmouth, Polk County.

Considering its condition and improvements and the price of land in 1864, I would say that this land might, at forced sale, have gone as low as five or six hundred dollars.

252 Cross-examination:

I am not certain who cultivated that land in 1864, nor in 1865. I didn't pay much attention to who attended to the place. I speak only from its general appearance when I speak of the improvements on the place. I never measured the ploughed land. I don't know whether the land east of the slough was cultivated in 1864. I couldn't say what year Moses Clark attended the place. He was on the year that Hayden claimed it.

I am certain they didn't crop 150 acres on the place the year they were there. If they swore that they did I would rather believe my own eyes. I don't believe there is over 150 acres of it now under cultivation.

I don't believe there was any fence around the orchard in 1864, only on the side next to the road. I couldn't say whether there was an acre of garden fenced in with paling fence. I don't think the old barn

253 wa' as long as the present one. As far as it went it may have been as good.

I estimate the $800 or $1,000.00 improvements in the fencing and getting land un*to* cultivation. I know the fencing above the road belongs to the place, and all the fence belongs to it excepting perhaps the Hurt fence, or part of it. In 1864 there was no *land* between the land and the Hurt place. The land is all now fenced in excepting by the slough.

R. DOTY.

B. S. WHITE is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is B. S. White; aged 33 years. I live in Polk County, Oregon. I have lived in the county since the fall of 1865.

I know the land in controversy in this suit. I first knew it in 1866. The improvements were poor. The fences are much better now than they were then, and the barn is better. There is more land now in cultivation than there was then. I don't know how much more.

254 I have had something to do with the fencing. I assisted my brother in hauling and putting up rails on the place—new rails. I can't state how many; between 4 and 5 thousand.

I don't know as I became acquainted with value of land in 1865 and 1866 in that immediate neighborhood. In the spring of 1866 my father was offered a quarter section in what I consider a better location, with improvements about equal to the improvements on the Dove land, and soil about the same, at seven hundred dollars.

(Objection.)

Cross-examination:

That place was northwest from the Dove place, about four miles from further market. I didn't rent any land of Mr. Hayden in 1866. My father rented some land of him in 1867. I don't know whether he paid a fourth or a third of the crop as rental. I can't tell what the yield was. I think the crop was wheat and oats. I can't say what wheat and oats were worth then.

255 One string of that new fence was [illegible] down the slough, and part of the rails were furnished to Mr. Hurt, because Mr. Hurt claimed all the line fence between him and Hayden. I don't know that Maxwell has hauled away those rails we put down by the slough. It is some time since I saw them.

Redirect:

There was not any of the upland prairie land of Rachel Dove's place cultivated in 1866, and I don't think there was in 1867. I know Moses and Henry Clark. They never cropped on that place to my knowledge. They might have cropped there in 1865 and I not known it.

B. S. WHITE.

J. W. **Edgar** is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is J. W. Edgar; am 40 years old. I live in Polk County; have lived there since 1866.

I am acquainted with the land in controversy in this suit. I
256 lived on it once about a year That was from the fall of 1870 to the fall of 1871. I raised a crop there. I knew the place a year or so before I went there. I had a friend living on it, and I went there to see him.

(Objected to as immaterial.)

There had been about 30 or 40 acres of upland in cultivation befor' I lived on the place, and about 30 acres of bottom between the house and the slough. I hav'n't see the place now for over a year. The last time I saw it the improvements were considerably better than when I lived on it, and when I lived on it it was considerably better than when I first became acquainted with it.

Cross-examination:

If a man had wanted crop all the land that had been ploughed and was susceptible of cultivation, and had cut briars off the prairie, and might have put in 80 or 100 acres.

257 There was big heavy briars on the land. I don't know how this claim runs east. I don't know, but I don't think any good husbandman would ever put that high land into cultivation. It is wet and white land and not worth cultivating.

If that claim runs a mile and quarter east and west, 150 acres of it could be cultivated more or less.

J. W. EDGAR.

W. T. **Clingan**, being called as a witness for the def't, is duly sworn, and deposes as follows:

My name is W. T. Clingan. I live in Polk County; am 53 years old. I am acquainted with Ben. Hayden, the def't; have know' him eighteen years. I know the Dove donation land claim. I don't know as I knew Rachel Dove's half. I remember some of the Dove place was sold at sheriff's sale in 1864.

Mr. Hayden was with me on the Red Prairie the day of the sale of that land. He went over there to a p'litical speaking. Red
258 Prairie is about twelve miles from Dallas by the road. It is northwest from Dallas. Mr. Hayden was then living at Dallas. The Dove place is about six miles from Dallas in a straight line, by the road it is about eight miles.

It is east from Dallas. The def't and I went together from Dallas to *to* Red Prairie. That day we started, I suppose we started about nine o'clock in the morning. We wanted to get there to the afternoon speaking. We came back together the next morning. I know that Hayden didn't come back to Dallas in the mean time. We started back together and stopped all night together on the road.

This was some time in March, 1864; I co'ldn't tell the day of the month.

Cross-examination:

That was rather early in the season for political speaking. Applegate had been over*e* there threatening to hang a lot of Democrats, and the Democrats sent for Hayden to come over and cheer them up.
259 The Republicans thought Ben. made a secesh speech, but the Democrats thought it was good Union speech. When I went to Hayden to go and make this speech he said he had to attend this sale. He said he would get some man to go over to the court-house and attend to the sale.

He said he would get Mr. Baldwin to go over and attend to it.

I saw Baldwin and Hayden meet on Hayden's return, and Mr. Baldwin said to Mr. Hayden he had bought the land, and they went together over to the court-house.

his
W. F. + CLINGAN.
mark.

Adjournment is taken until to-morrow, the 27 day of April, at the hour of 9 o'clock a. m.

W. B. GILBERT, *Exam.*

Upon this 27 day of April, at 9 o'clock a. m., appear the said parties held as of yesterday, and hearing is resumed.

G. W. Lawson is called as a witness for the def't. Being duly sworn, he deposes as follows:
260 Ques. Please examine the paper I now hand you, purporting to be a copy of complaint and summons in the suit of Rachael Dove, pl'ff, vs. Ben. Hayden, def't, and state in whose handwriting this purported copy of complaint is, and this certificate thereto attached of the correctness of the copy.

Ans. It is in mine. I wrote it. It is a true copy, unless alterations have been made in it. I would say, from cursory examination, that I don't see any alterations.

Defendant offers in evidence the said copy as an exhibit. The same *a*s filed herewith, marked Exhibit No. 3.

G. W. LAWSON.

A. Bush is called as a witness for the defendant. Being duly sworn, he deposes as follows:

My name is A. Bush; age, 53; I live in Salem; I am a farmer and banker; I am acquainted with P. C. Sullivan; I have known him over

ten years; I have known him well for 8 or 10 years; he has been
261 residing at Portland, *at* and at Polk County, and at Salem; I
am told he has left Salem and gone east of the mountains; he
went away quite recently; he resided here some years—three or four;
I don't know whether he came here directly from Polk County or went
to Portland first. I am acquainted with his reputation for truth and
veracity in Salem and somewhat in Polk; that reputation is bad.

Cross-examination:

He is an att'y. I mean by the reputation for truth and veracity, the
general confidence of the community in his word and in his statements;
the general expression of opinion about him in that regard. I use the
expression in this sense, that it is a common remark that his reputation
for truth is bad. Some two years ago, I think, I heard it said he was
to be impeached in a case, and that witnesses were brought from Polk
County to impeach him, and I have heard he has been contra-
262 dicted by statements in cases where he was witness. I don't
mean to say he is common and constant liar.

A. BUSH.

is called as a witness for the def't. Being duly sworn, he deposes as follows:

I am acquainted with Bethuel Dove. My name is Minerva A. Dice; I live in Polk County; I am the wife of Elza Dice.

Ques. Please state whether, on the first Monday in December last, at the house of Elza Dice, in Polk County, in the presence of your husband and yourself, Bethuel said to you, or one of you, that if his suit with James Jones was in as good a fix as his suit with Ben. Hayden he would be satisfied, or words to that effect.

The words he used were, "It would be all right," instead of he
would be satisfied. I just heard him say to Mr. Dice, in answer to his
question what disposition of the Jones lawsuit he was going to
263 make, that he didn't know hardly, but if was in as good a fix
(or as good a condition) as his Hayden lawsuit it would be all
right.

(Objection.)

I am acquainted with Rachel Dove. I know the Rachael Dove donation land claim. I live about a mile or a mile and a half from there. I had a conversation with Mrs. Dove about mortgaging her land to the school fund. I heard she had signed a mortgage to her half section of land, and the first time I visited her afterwards was about ten weeks after. I told her I heard she had signed a mortgage to her land. She said she had. I told her I wouldn't have done that for nothing. I told her if we didn't sign anything to our half sections of land we could always hold it for a home, and she said Mr. Dove would raise the money or would make the money and pay it off, and her signing the mortgage wouldn't make any difference.

(All above objected to.)

264 She said nothing about any one having persuad*ing* her to sign
the mortgage. She never named Ben. Hayden as having any
connection with it.

Cross-examination:

After she made me that answer about the mortgage she turned off and went into the kitchen. I didn't hear Mr. Dove say anything at that conversation to Mr. Dice about the reason one case was in a better fix than the other. I didn't hear all that was said.

I didn't hear anything said about one being in equity and the other at law.

(Objection.)

M. A. DICE.

Elizabeth E. Jones is called as witness for the defendant. Being duly sworn, she deposes as follows:

My name is Elizabeth E. Jones. I live in Polk County. I am the wife of Jame' Jones. I am acquainted with Bethuel Dove. I have known him twelve or fourteen years. I was acquainted him in 1864.

265 Ques. 1. Did Bethuel Dove, in the fall of 1864, near the house on the land in controversy, where he then resided, in the road out by the orchard, say to you and your husband and in your presence that Hayden, the def't in this suit, had bought the land in controversy in this suit and paid for it, and that he was satisfied he would *that* never get it back, but that he had to tell the old lady (meaning his wife) so as to pacify her, or words to that effect?

Ans. Yes, sir. It occurred in the house. All was said in the house. He said what you state in the question. It was in the house that Mr. Dove lived in on the Rachael Dove donation claim. That house is not 100 feet from the road. There was at that time I think some orchard around the house. I wouldn't be positive.

(Objection.)

Cross-examination:

Mr. Jones, myself, Mr. Dove, a man by the name of Claws, Bill Tillotson, and Geo. Bolter were present at that conversation.

ELIZABETH JONES.

266 T. M. Dice is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is T. M. Dice. I am 28 years old; live in Polk County.

I have resided in Polk County most of the time since I was born.

I know the Rachel Dove donation land claim.

The improvements on that land in 1864 I don't recollect distinctly. Some years later than that I recollect how they were.

The improvements, fences, and barn are much better now than when I first remember them, and there is some more ploughed land now than there was then.

Including the amount of ploughing and fencing, to the best of my knowledge there $800 or $1,000 worth more of improvements now on the place than there was when I first remember the place after 1864.

There have been a good many new rails put upon the place.

267 I know of land equally as good without improvements selling about 1864. My father bought a piece on the river bottom at four dollars an acre, 22 acres; to the best of my knowledge as good as any of the Rachael Dove land.

Taking into consideration the value of land then, that land with the improvements was worth in 1864 at cash sale, to the best of my knowledge, from one-third to one-half of its present value.

In 1864 I was about 14 years.

Cross-examination:

I suppose that 22 acre' is the same that my father testified about. I didn't hear his testimony.

T. M. DICE.

Adjournment is taken to the office of the examiner, at Portland, on the 10 day of May, 1878, at the hour of 10.30 a. m.

W. B. GILBERT, *Examiner.*

268 Upon this 10 day of May, 1878, at said hour of 10.30 a. m., the said parties appear as before, and hearing of the cause is resumed:

W. S. **Frink** is called as a witness for the def't. Being duly sworn, he deposes as follows: My name is W. S. Frink; am 49 years old; live at Polk County, Oregon. I hold the office of county clerk of Polk County; have held the office nearly four years.

There has been on file in the circuit court of the State of Oregon for Polk County during my term of office papers in a suit by Rachel Dove, pl'ff, vs. Benjamin Hayden, def't. The original papers in said suit are not now on file in my office. I do not know where they are. After a thorough search I failed to find them. I last saw those papers, as near as I can recollect, some time in the fore part of 1865. I do not know who took the papers from my office. There is a substituted copy of the original papers now on file in my office, or what purports to be
269 as substituted copy. I made repeatedly thorough and complete
search in my office for those original papers in that case, but failed to find them.

Cross-examination:

I have the custody of those papers as clerk. Attorneys interested in those papers might have got them out of the clerk's office without my knowing it.

W. S. FRINK.

J. J. **Daly** is called as a witness for the def't. Being duly sworn, he deposes as follows:

My name is J. J. Daly; am 35 years old; live in Dallas, Polk County, Oregon. I am an att'y at law. Some time, I think, in the year, in the fall, of 1874, after the service of the papers in the suit of Rachel Dove against Benjamin Hayden in the circuit court of Polk County, Mr. Hayden came and employed me to assist Judge Boise in defending the action. I think he employed Judge Myer at the same time I was
270 employed in the case and commenced acting as his attorney.
At that time he brought me this paper (Exhibit No. 3) as the copy served on him by the sheriff. I think Judge Myers, Judge Hayden, and myself talked the matter over, and put in a demur'er, and Judge Boise put in a motion. I think Exhibit 3 is the copy Mr. Hayden brought as the copy served on him by the sheriff. I never compared this copy with the original, but I always supposed it to be a true copy. Subsequently Judge Upton was called into the case for the defence, and, before the case came to a final hearing, Mr. Lawson & Hill Thayer and Williams withdrew the action from the circuit court.

(All above objected to by plaintiff as immaterial.)

Judge Upton then thought that Mrs. Dove could not dismiss the cause without a final hearing, and appealed to the supreme court from the order of dismissal. We then proceeded to have our transcript perfected for appeal for the December term, 1875, of supreme court. I went to Mr. Frink, clerk of the court, to have the transcript
271 made. We searched and couldn't find the papers. I think that
Mr. Frink, his deputy, and I, all searched the vault through together thoroughly without finding the papers. We then, on motion

based upon affidavits of the loss of the papers, appealed to the court to substitute new ones, and on the substituted papers the case went to the supreme court. That court decided that Mrs. Dove could dismiss her own case.

(All above objected to by pl'ff's counsel as irrelevant and immaterial.)

Cross-examination:

I do not know of my own personal knowledge what became of those papers. I have my suspicions. I do not what became of them. I was anxious to know. They were important to our case, and could not be found in the clerk's office.

I don't think the substituted papers were more favorable to the def't than the original papers were.

Mr. Hayden never gave me any information of what became
272 of those papers. We both had our suspicions as to who got
the papers. We thought Mr. Sullivan might have got them out and lost them. I don't think Mr. Sullivan appeared of record as having any interest in that cause. I think he had an interest in it, and on reading Mr. Sullivan's testimony in this case, in which he said he was employed as an attorney in that case, I am confirmed in that belief. I always thought he was interested in it, and often told Mr. Hayden I thought Sullivan was at the bottom of the case. Mr. Sullivan was an att'y at that time practicing in Polk County and Marion. He was a lawyer of ordinary capacity, in fact of extraordinary capacity. I think he had enough of intelligence to know that if papers were lost they could be substituted.

State what possible advantage it could be for him to steal those papers.

(Objected to as incompetent and immaterial.)

I have not said that he stole the papers. I think what I said is plain. The records show for themselves that Mr. Sullivan did not appear as
attorney in that suit.
273 I don't understand from Sullivan's testimony that he swears
he was attorney in that suit. What I say is that from Mr. Sullivan's testimony I glean the fact that he had been interested in some way in the matter between Mrs. Dove and Mr. Hayden at one time.

JNO. J. DALY.

Benjamin Hayden is called as a witness upon his own behalf. Being duly sworn, he deposes as follows:

My name is Benjamin Hayden. I reside in Polk County, Oregon. I am the def't in this suit. I am acquainted with Bethuel Dove and Rachel Dove, his wife. I can't say I am acquainted with Chas. Manning, the plaintiff; I am acquainted with his wife, Elizabeth Manning. I became acquainted with Mr. Dove in the fall of 1852, and with perhaps a year or so later. This paper, Exhibit No. 1, filed in this cause, is not my handwriting, nor any portion of it. I couldn't say in
whose handwriting it is. I had no connection with the prepar-
274, 275 ing or draughting of that mortgage. Prior to the execution of
that mortgage I have no recollection of having any conversation with Mrs. Dove in reference to the execution of the mortgage. I was spoken to by Mr. Dove in regard to the foreclosure suit and the defence in the matter. Mr. Dove was of the opinion that the manner in which the mortgage was signed would invalidate it. I told him I thought not. He said then he had no defence to the merits of it, and if he could gain time in any way he would like to have me do it for him. I

told him that I didn't think the law clear as to the right of the county treasurer to bring suit; that we could test that by demur'er, and if it was sustained by the court the case would necessarily go over until the next term; and at his request I filed a demur'er for that purpose. I had no conversation whatever with Mrs. Dove in regard to appearing for her in that foreclosure suit, either before or after the foreclosure,
that I recollect of. I never at any time did any business
276 for Rachael Dove as her attorney, unless filing of that demur'er
might be considered as done on her behalf, though I didn't intend to act as her attorney in the matter. I was acting entirely as Mr. Dove's attorney in the matter, and at his instance and request alone.

I never said to Mrs. Dove that if she would sign the mortgage I would see that she should never lose her place. I never did anything to get her to sign the mortgage. I used no influence to get her to sign it. I had no reason to do so. I had no interest in getting her to sign it.

I never told her that I would mortgage my place before she should ever lose hers. I had some unimproved land, not worth over four hundred dollars at most, and that was all I had then. I had no farm to mortgage. I will state that soon after the execution of the mortgage I was at Mr. Dove's house by request, and Mrs. Dove asked me if there was
any danger of her losing her place; I told her if the note was
277 paid when due there was no more danger of her losing hers or
her place than there was of me losing my place.

I never left any word with Mrs. Manning or with any one at any time that I would bid in the place for Mrs. Dove, or have some one to bid it in for her, and never sent such a message to Mrs. Dove by any one, neither upon the day of sale of the land, nor at any other time.

I know E. P. Dove, the son of Rachel Dove. I had no conversation with E. P. Dove on the day of sheriff's sale, nor at any other time, about telling his mother not to be uneasy about the land, or that I had left a man there to bid off the place for her, nor about any sheep to be let on shares. I was not at Eola upon the day of sale of the land. I had no sheep at that time to let Mr. Dove or any one else have upon shares.

On the day of the sheriff's sale of this land, I left Dallas in the morning and went out to Jackson precinct, some 12 or 15 miles north-
278 west of Dallas, and remained there to attend a political meeting, and
remained there until next morning, and then returned to Dallas.

I was not nearer Eola than Dallas that day.

A man by the name of John Baldwin acted for me at the sale he went back to Missouri and died there. I requested him to bid for me at that sale. I asked him the evening before. I did not see any of the Dove family between the time I asked Baldwin to bid for me and the time of the sale, nor for several weeks prior, that I recollect of.

Ques. State whether in June or July, 1864, you had a conversation with Rachel Dove and Elizabeth Manning, in which Rachel Dove told you she had some money for you to pay on her land, and whether you said you were glad of it, as you wanted some money to buy some sheep to put on your ranch in the hills, and whether Rachel Dove told you at
that time that if you had not promised her that she should have
279 her land back again she would never have signed her right away,
and whether you said the land had been hers and should be hers again, and that all you wanted was your money back, with interest. Did you have that conversation or any part of such a conversation?

Ans. I had no such conversation, nor any part of it.

I received two hundred dollars from Mr. Dove upon a contract of sale to him of this land in question, a verbal contract. A short time prior

to the payment of this money, I told Mr. Dove if he would pay me twelve hundred and twenty-five dollars, with interest, within a years' time—pay the whole of it within that time, and six hundred and fifty dollars at once or soon (which sum I had borrowed from Mr. Butler), I would sell him the land. Mr. Dove paid me two hundred dollars, and told me at the time that if he was not able to pay it all or any more the rent of the place for two years would be worth two hundred dollars to him.
280 He was living on the place at the time.

He never paid me any more or offered to pay me any more towards the purchase of the place.

Before this two hundred dollars was paid me I think I had some conversation with Mrs. Dove. I was passing by and called to see Mr. Dove. I thought he was slow about making any payment on the $650, which was to be paid down. I told Mrs. Dove that I had that money to raise, and if Mr. Dove couldn't pay it I would have to borrow it.

That is all the conversation I recollect having with Mrs. Dove.

I did not in that conversation say to Mrs. Dove that that place had been hers, and it should be hers again, or that all I wanted was to get my money back, or that I would fix it so no one could get it away from her again, nor anything of the sort.

I never at any time had any conversation with Mrs. Dove in
281 which I promised to let her have the land back, or to secure
it for her, or to purchase it in for her at the sale. Mrs. Dove and I never talked a word about my bidding it in for her prior to the sale nor subsequent to the sale. I didn't know, until my agent had bought it, whether I or some one else would get it. I had to borrow money to pay for most of it, and was not certain whether I could obtain it or not.

I borrowed the money of J. B. U. Butler, six hundred and fifty dollars.

(Objected to as immaterial.)

There was no note given to Mr. Butler; I only gave my word.

I mad' partial arrangements with Butler for the money before the property sold, but didn't get the money until afterwards. I had told him I would want it in a certain contingency.

I know James Ladd; he was residing at St. Helen's the last I knew of him. I knew O. H. Smith; he is dead now. Mr. Clark left the place in 1865. I neither notified him to leave nor instituted
282 any proceedings against him. I did not know when he left.

I rented the place to a man by the name of Lucas in October, 1865, and what time Clark left I don't know.

Mr. Clark paid me the rent upon an order given to me by Smith upon him for the rent; what the amount of rent was I don't recollect exactly; it was a very small amount. There was a very small portion of the land under cultivation. Mr. Dove remained on the place after I bought, I don't know exactly how long, but till late into the fall of 1864 or early in 1865. I learned that he had rented the place to Smith, and had taken up a homestead on the island adjoining. I think I learned it in 1865.

Mr. Dove cultivated a portion of the land, however, in the year 1865; at least what I always supposed to be a piece of it. All I know about Dove's cutting timber on the place was the appearance of fresh stumps and what other parties told me about it. I was informed that Mr. Dove
was cutting timber and rafting it to the Eola mill and Salem. I
283 sent word to Mr. Dove not to cut timber on the premises. Mr.

Dove came to see me, and notified him personally not to cut the timber.

I acted as attorney for Mr. Dove, in conjunction with Logan and Shield, in the case of Griswold against Dove in 1857 and 1858. I had, prior to that time, several years before, drawn up a deed for Davis to Dove for land, also a mortgage on the same land at the same time from Dove to Davis to secure the unpaid part of the purchase money. I don't know of any other business I ever transacted for Mr. Dove that would require the services of a lawyer.

In that suit of Griswold vs. Dove, Logan and Shield performed the principal part of services as counsel.

Bethuel Dove never paid me nor offered to pay me any portion of the purchase money of that land except the two hundred dollars. I know Mr. Kennedy; I have known him for some twenty years.

284 State if at any time in 1864 you had a conversation with Kenedy in which you told him you had bid in the land or got it done, so that the Doves or either of them would have a chance to redeem their land.

I never told Mr. Kennedy any such thing.

State whether about the time the sale was confirmed, or a little after, you told Kennedy that Dove had gone over to cut timber off the land, and that you had dispossessed them.

I did not tell him so at any time. I never dispossessed Mr. Dove; never notified him to leave, nor talked to him about leaving, nor knew when he did leave. I notified Mr. Dove not to cut the timber, and some time afterwards, I don't know when, he left the premises voluntarily.

State whether you ever had any conversation with this Kennedy in presence of this J. B. V. Butler about securing Butler as Dove's surety, or pr'curing Butler to be released from such suretyship, or anything to that effect.

285 I had no such conversation with Mr. Kennedy in presence of Mr. Butler. Did not know and had not heard that Mr. Butler was at that time security for Mr. Dove for anything, but knew from Mr. Dove himself, at that time, that he claimed that Butler was indebted to him in a considerable sum, that he had overpaid Butler in scrip for paying his (Dove's) security debt to Griswold.

This Kennedy has resided in Polk County since I first knew him up to 1869 or 1870.

(Objected to as immaterial.)

He went east of the mountains after that and was gone several years. He now resides in Salem. I am acquainted somewhat with his reputation for truth and veracity in the communities in which he has resided, in Polk County and at Salem.

Ques. Is that reputation good or bad?

Ans. I do not wish to answer that question directly. I will only say that he was indicted in Polk County some few years ago for perjury, and left before arrested, and went east of the mountains and remained there until Colonel Ford, the prosecuting witness, died.

286 (Objected to as incompetent and immaterial, and counsel for pl'ff moved to strike all above answer out as incompetent and immaterial.)

I know G. W. Lawson; I have known him since about 1854.

State whether you had any conversation about April, 1864, with G. W. Lawson about the lands in controversy, and the claim of the Doves to it, and whether in that conversation you said anything to him about having been Rachel Dove's attorney, or said that it did not make any difference about you being her att'y, because the land had been sold publicly at sheriff's sale.

I had a conversation with Mr. Lawson at his request about that time, I presume, relative to the Dove claim against me. Mr. Lawson told me that they claimed that I was acting as Mrs. Dove's attorney at the time. I told Mr. Lawson that I had never acted as Mrs. Dove's att'y in my life, and never knew that she had any business in court requiring an att'y, but that if I had been her attorney I did not know but I
had the same rights that any other person would have to pur-
287 chase land or any other property sold at sheriff's sale. I told
Mr. Lawson that I had agreed with Mr. Dove that, if he would pay me my money with interest within one year, I would sell him the property; make him a deed to the property.

Did you say anything to Mr. Lawson about offering Mrs. Dove some sheep once to pay her back the $200 that she had paid on the land to redeem it?

In this conversation the question came up as to my offering her some sheep at one time in payment of the two hundred dollars that Mr. Dove had paid me. I told Mr. Lawson that Mr. Dove was owing me a great deal more at the time that the $200; that after Mr. Dove had left the place I had learned through a man by the name of Bolter, that was living at Mr. Dove's, that Mrs. Dove claimed that the $200 was her money; that I had told this Bolter that if that was the case, I would give Mrs. Dove 50 ewes if she would quitclaim the premises to me. I stated further to Mr. Lawson in this conversation that I was
not owing them anything nor under obligations to pay them
288 anything; that they had abused me a great deal about the mat-
ter, but out of sympathy for her, if she was disposed to give me a quitclaim deed yet, I would give her two ponies that I had.

Mr. Lawson wanted me to offer four or five hundred dollars, and said she would not be satisfied with the horses. I told him I was not hunting up compromises; that I had called at his suggestion; that he could see her and let me know; that I had no further proposition to make.

I know P. C. Sullivan. I have read his deposition in this case.

Ques. State whether you had the conversation that he claims you had with him in Dallas, in his office, about seven or eight years ago.

Ans. I had a conversation with him there about that time in regard to the claim of the Doves; not so much about the land in question as to the return of the $200. I don't know that anything was said about
the land except in connection with the $200. It was in Sulli-
289 van's office. I don't recollect of having but the one conversa-
tion. I did not in that or any conversation with Sullivan tell him that I had agreed with Mrs. Dove to bid off the land for her. I did not in that or any conversation with Sullivan tell him that I had agreed to give Rachel Dove a reasonable term in which to refund the money.

I remember Sullivan's showing me that receipt for $200. I did not tell Sullivan that that receipt was for money received from Rachael Dove upon the land. I had received no money from Rachel Dove. I did not in that or any conversation tell Sullivan that if Rachael Dove would furnish me the balance of the money I would make her a deed to the land. I did not tell Sullivan that after what I considered a reasonable time had passed for her to pay the amount of the bid or the balance of the bid, I then applied the $200 on account against B. Dove, the husband. There was no agreement to arbitrate the matter between the Doves and me drawn up. I never heard of any such agreement until I saw it in Sullivan's deposition.

290 I did not in any conversation with Sullivan tell him I had offered to give Mrs. Dove from one to two hundred sheep if she would make me a quitclaim deed to the land. I told Mr. Sullivan that as soon as I learned from George Bolter, after Mr. Dove had left the premises, that Mrs. Dove claimed that the $200 was her money. I proposed through George Bolter to give Mrs. Dove 50 ewes if she would make a quitclaim deed, and that the ewes were worth four dollars per head.

I know pretty well what that receipt contained. I might miss it in a few words if I tried tell what it was.

It has been a number of years since I saw it. After the day and date, July, 1864, as I recollect, it ran in this wise:

"Received of Bethuel Dove, two hundred dollars, to be applied upon the land purchased by me at sheriff's sale;" that I think is substantially the wording of the receipt. It is perhaps 10 years since I saw it. It was signed by me, of course.

I think I saw this Exhibit No. 3, in Oct., 1864, at Eola, in
291 Polk County. I don't think I was at home when the sheriff
came, and he just handed it to one of my family at my residence.

I don't know anything of the whereabouts of the original papers in the suit of which Exhibit 3 is one of the copies.

Cross-examination:

I have stated all the language of the receipt I gave Mr. Dove, as near as I can recollect, and I scrutinized it very closely, the last time I saw it, when the matter had been placed in the hands of counsel.

Quest. Did not said receipt contain the further words " sheriff's sale," "the land known as Mrs. Dove's half of donation land claim, dated July 26, 1864?"

Ans. If my recollections serves me right, the words "the land known as Mrs. Dove's half of donation land claim" was not in the receipt, but the date may be correct.

Ques. 2. Look at Exhibit F, and state whether the purported copy of the receipt is correct or not.

292 Ans. My recollection is that that portion of the receipt which says "the land known as Mrs. Dove's half of donation land claim" was not contained in the receipt I gave Mr. Dove.

(The complainants offer in evidence the said Exhibit F, and the same is filed herein, under objection by counsel for defendant as being incompetent, immaterial, and irrelevant, and not proper cross-examination.)

I think I answered the complaint Exhibit 3 by demur'er and motion both. The demur'er or motion was sustained, and an amended complain't was filed; no copy was served. Issue was joined on the amended complaint, and nonsuit was allowed at the instance of plaintiff.

(Objected to as immaterial and not cross-examination.)

Ques. 3. Did you in said answer state the following words, "That when said decree was entered in said suit, all his duties as an att'y in said suit had been fully performed, and upon the entry of said decree this
defendant ceased to be the attorney of the said plaintiff or
293 her said husband?

(Objected to as incompetent and immaterial, and because the witness, when questioned about statements contained in his sworn answer, is entitled to have the original shown him before he can be called upon to answer).

Ans. I am not prepared to say whether I did or did not. It has been some time ago, and the papers were taken out of the court, and I have not been able to see the answer.

Adjourned until to-morrow, May 11th, 1878, at 9.30 a. m.

W. B. GIBBERT, *Examiner*.

MAY 11TH, 1878, at 9.30 a. m.

Present, the said parties as of yesterday.

Cross-examination of Ben. Hayden is resumed:

That receipt was intended to refer to the land in controversy in this suit.

The two hundred dollars was paid on that land.

Ques. Look at this paper and see if it is a copy of the answer you filed in Polk County circuit court, in the suit of Rachel Dove
294 vs. Ben. Hayden?

Ans. I can't tell without reading it over, and by reading it over I can't tell whether it is a true copy without having the original to compare it with.

Ques. Did you or not in that answer use the following language, "And this defendant admits that he received the two hundred dollars mentioned in said complaint, but he says that the same was paid to and received by him from the said plaintiff and her said husband as rent for the use and occupancy aforesaid of said land, and no other account, and for no other purpose?"

(Objected to as incompetent and immaterial, and because the witness is entitled to be shown the original answer on being interrogated as to any portion of its contents).

Ans. I have no recollection of using in that answer that language, disconnected from other statements connected with it, or that language at all.

Ques. Did you have a conversation about six years ago, at
295 Eola, in Polk County, in Doty's store, with William Jones, in
which you and he talked over the matter what his (Jones') testimony would be on the conversation you and he had, relating to the bidding off of Mrs. Dove's land; and did Jones then tell you that he had said that he would bid twenty-seven hundred dollars for the land, or bid it up to that figure if it was to be sold, but Dove had told him that you, Hayden, were to bid off the land for Mrs. Dove; and did you say in reply that you didn't want it run up high, because the old folks were broke up, and could not pay much for it, or words to that effect?

(Objected to as incompetent and immaterial.)

Ans. I have no recollection of any such conversation with Mr. Jones at that or any other time. Mr. Jones never told me that he would pay twenty-seven hundred dollars for the place, nor did I ever tell Mr. Jones at Doty's store, nor elsewhere, that I did not desire the place to bring very much for the reason that the old folks were not able to pay much, or for any other reason.

(The counsel for complainant offers in evidence the copy of an-
296 swer as an exhibit, and asks it to be filed.

The examiner rules that the exhibit is not entitled to be filed at this time on behalf of the complainant, not being proved to be a copy of the answer, and the def't not having closed his testimony.)

I never received the place from Mr. Smith at all. I have no recollection of having any conversation with Mr. Dove in regard to giving his wife sheep at all, or with his wife either about the sheep. I wouldn't say that I didn't have the conversation with Mr. Dove. Mr. Dove had the use of the place in the year 1864, and of a portion of it in 1865, and the proposition I made to give Mrs. Dove was through George Bolter.

Redirect examination:

Wm. Jones and I are passablely friendly at present. We have not always been so. We were not so a year or two ago. I owned considerable land, some adjoining Mr. Dove's claim and some in that immediate neighborhood, at the time I bought the Dove land.

(Objected to incompetent and immaterial.)

297 About that time, perhaps in 1864 or 1865, I purchased of John Davis 320 acres of land that adjoined this land in question. It was what was called prairie land, with some brush; perhaps 200 acres of it could have been ploughed without any clearing being done. I paid for the Davis land five hundred dollars, $275 of it in horses, the residue in money, at private sale.

(Objected to as above.)

I purchased of a man by the name of Taylor bottom land, mostly timber, about two miles from the Dove place, along in 1867 or 1868, 168 acres of land, for which I paid three hundred dollars at private sale.

(Objected to as above.)

About the same time I purchased of Mr. Ladd, I believe, 160 acres of land lying near the Dove place—nearer Salem—at private sale, for five hundred dollars; that was bottom timber land—no open land on it.

(Objected to as above.)

298 About in 1864 or 1865 I purchased at sheriff's sale, near Monmouth, 311 acres, for five hundred dollars.

In 1869 I purchased at private sale the donation land claim of Mrs. Fudge, adjoining the land in controversy, lying south, 320 acres, for two thousand dollars, part cash in hand and part on time.

(Objected to as above.)

That donation claim was a portion prairie and a portion bottom and island land, similar to the bottom and island land on the parcel in dispute. The fencing was mostly new and tolerably good. There was a substantial dwelling of red cedar, a large kitchen, portico the full length of the house latticed in at either end, three rooms below besides the kitchen, all well finished and ceiled inside with red cedar, except overhead upstairs. Upstairs was not partitioned off into separate rooms. There was a large, well-finished, new barn on the place.

(Objected to as above.)

299 I don't know how many acres were under fence; perhaps 100 acres, may be more. In 1865 I purchased university land at public auction, near this place, at two dollars per acre; all timbered land. In 1859 or 1860 I purchased land adjoining this in controversy at sheriff's sale, a portion of it under substantial fencing, at a trifle over a dollar an acre. I gave a hundred dollars for 87½ acres.

(Objected to as above.)

Recross-examination:

can't say whether there was a dispute about that Davis land, or

title to it, that lowered the price of it. I will state what Davis told me about it. Mr. Davis told me that Sullivan & Whitson didn't think he had anything but a life interest in a portion of it. That is all I know of any dispute in regard to title. I never heard of any dispute or talk about the title to the Fudge claim. I got the patent when I bought it and a warranty deed. I never heard anything said about Fudge
300 having thrown up his donation claim, and about the deed of his wife not being recorded until after his death.

Those island and bottom lands I spoke of are subject to overflow, and so is all the best tillable land in the land in controversy—is subject to overflow.

Those bottom lands I spoke of buying were all improved, except this 87½ acres I speak of; a portion of that 87½ acres was improved.

My impression is, that 87½ acres had been once sold at sheriff's sale and Mr. Dove had redeemed it.

Redirect examination:

I don't mean to say that all the bottom land on the Fudge place was unimproved. The best part of it was improved when I bought it.

B. HAYDEN.

T. J. **Baxter** is called for a witness for the deft. Being duly sworn, he deposes as follows:

My name is T. J. Baxter, and am 47 years old; live at Albina, Multnomah County.

301, 302 In 1864 and 1865 I was residing at Eola, in Polk County. I was in the lumbering and flour-mill business. I know Bethuel Dove. I got acquainted with him, I think, in 1863. I purchased logs from 1863 up to 1865 or 6 at various times.

(Objected to as immaterial.)

I think I know of Mr. Dove selling saw-logs to others than myself. I think he ran some logs to Salem—he and Mr. Tillotson.

(Objected to as above.)

I believe know the land in controversy in this suit, though I don't know as I know all the lines. I know the country through there. I think I know where Dove got the logs that he was hauling through. I don't know as I can say whose land it was. I know the spot.

(Objected to as above.)

He was getting the logs about ¾ of a mile from my land; somewheres nigh that distance. It was on a slough that ran through my land and emptied into the Rickreall above my mill.

(Objected to as above.)

303 This land was located on that slough, the land in controversy in this suit. The slough runs south-of-west. I mean to say that Dove ran the logs through this slough into the creek.

(Objected as above.)

I believe I got some logs of Dove and Tillotson, in the spring of 1865; I am not positive whether it was in 1865 or 1866. It is entered in January in my book, but the year is not entered. It is an entry of $4.50 per thousand, amounting to $60.55; that was the last I bought of Mr. Dove. That was just about the time I sold out the mill.

(Objected to as above.)

I don't think at that time I knew of Dove having any other land at that time than the land in controversy. Soon after that I learned that he had taken up a homestead. I don't think I ever heard him say anything about who owned the land where he was cutting timber.)

(Objected to as above.)

304 From what I know of the land in controversy and the the location of the place where they were cutting logs, I think it was the same land; still I am not positive. I might have known at the time exactly; but it has been so long since I don't remember. I went up there once to their camp to see Mr. Dove.

(Objected to as above.)

Cross-examination:

I don't know the lines of the land in controversy in this suit. I know the locality of it.

I understand the land in controversy in this suit to be the donation claim of Mr. Dove.

I never went up there but once when they were cutting logs. I went to contract for timber. I didn't care at all then whether he was getting the timber on his own or some one else's land. For aught I know he might have got his logs of other people living in that 305 neighborhood. I remember his cutting once quite a lot of logs off of my own land prior to that. I don't remember his getting timber off the Davis land, though he might have done so.

I remember Mr. Dove speaking to me about seeing Mr. Hayden about $300, but I don't recollect whether I went to see Mr. Hayden about it or told my clerk to tell Mr. Hayden that I would become responsible to Mr. Hayden for $300, but I don't recollect now whether it pertained to land or what it did pertain to. I don't think the arrangement was made.

(Objected to as not cross-examination.)

I think this was a little ahead of the time I got them logs. I think it was in 1865.

Redirect:

I think the $300, was to be applied on this contract with Dove. 306 He said he was owing Mr. Hayden, and wanted me to settle it so that Mr. Hayden could get $300.

Recross-examination:

Stumpage then was a dollar a thousand; that was the usual price.

T. J. BAXTER.

307 Defendant offers in evidence a certified transcript of the pleadings in case of Joseph Emmons, treasu'er, vs. Betheul & Rachel Dove, in Polk County circuit court.

(Objected to as incompetent and immaterial.)

The said transcript is filed herewith, marked Exhibit 4.

Defendant offers in evidence a certified copy of decree of court in same cause.

The said copy is filed herein without objections, marked Exhibit No. 5.

Defendant offers in evidence a copy of the order of confirmation of sale of land under said decree.

(Objected to as incompetent and immaterial.)

The said copy is filed herein, marked Exhibit No. 6.

Defendant offers in evidence a certified copy of sheriff's deed to defendant, dated April 20th, 1864, to the land in controversy in this suit.

(Objected to as above.)

The said copy is filed herein, marked Exhibit No. 7. The def't here close their testimony. Adjournment is here taken until Wednesday, May 15, 1878, at 10 o'clock a. m.

W. B. GILBERT, *Examiner.*

308 Upon this 15’ day of May, 1878, at 10 o’clock a. m., the said parties reappear as before, and further hearing is adjourned until Monday, May 27, 1878, at one o’clock p. m., at the court-house in Salem, Oregon, by consent of parties.

W. B. GILBERT, *Examiner.*

Upon this 27th day of May, 1878, at one o’clock p. m., at the court-house in Salem, Oregon, appear the plaintiff in person and by G. W. Lawson, esq., of his counsel. The def’t not appearing, after waiting for the def’t a half an hour examination of witness for complainant is begun.

E. P. **Dove** is called as a witness for the complainant, and having been heretofore duly sworn, he deposes as follows:

I had a conversation with Mr. Hayden since the commencement of this suit regarding what I would swear to in this case. Part of it was in regard to what I have already testified to in the case. I was then in Eola, and he waited.

Adjournment.

309 The def’t, appearing in person, requests an adjournment until he can hear from his counsel. Hearing of the cause is therefore adjourned until Tuesday, the 28, at 9.30 o’clock a. m., at which time, the def’t making no appearance, the examination of E. P. Dove is resumed:

I was there in Eola, and he wanted to have a talk with me. He took back of the store to a little warehouse; he wanted to know what he told me down to Warner’s store at the time of the sale. I says to him, you don’t deny but what you told me you left a man there to bid the place off for mother? He said he didn’t deny it, but mother never furnished him no money; he said he expected I would be a witness in the case. I told him I didn’t know whether I would be or not. He said, I don’t care whether you are or not. That was all.

That was some time since the commencement of this suit?

That conversation I had with Mr. Hayden in the first place, I don’t recollect whether it was on the day of the sheriff’s sale or the day before the sale.

310 In 1863 James Jones, Norman Scott, and I doubled ridered and staked a fence from James Jones’ house clear across the donation claim west of the road to the Fudge land. I paid Norman Scott for fencing from the widow Fudge, east side of the road, to the half-way side of the Dove donation land claim, in 1864. Father moved the fence on to the top of the hill; the fence, where we left it, in 1864, was just as good as it was when we fixed it, in 1863.

There is a little more of the bottom land on the claim in cultivation now than in 1864.

There was about 35 acres of bottom land on Rachel Dove’s land over across the slough in cultivation in 1864, and about 25 acres or 30 acres east side of the slough. Now there is 35 or 38 acres in cultivation on the east side, and across the slough somewhere in the neighborhood of 40 or 45 acres.

Of the upland land under the plough I think there was 120 acres of the Rachel Dove donation in 1864.

In 1863 I raised a crop on that bottom land that raised 106 bushels of oats to the acre.

311 It grows from 25 to 30 bushels of wheat to the acre.

E. P. DOVE.

Lawrence C. Perry is called as a witness for complainant. Being duly sworn, he deposes as follows:

My name is Lawrence C. Perry; I live in Eola, Polk County; I am 33 years old.

I am acquainted with the Rachel Dove donation claim. I live about 3 miles from the place; I lived on the place a couple of months; I have worked there in harvest, more or less, for the last ten years. When I first became acquainted with the land there was not much upland prairie in cultivation, perhaps not more than 40 acres. Now there is probably over a hundred. At the time I was first acquainted with the place, ten years ago, there was about 45 acres of bottom land in cultivation on the west side of the slough. I don't know how much there was on the east side, perhaps 35 or 40 acres.

312 In speaking of the upland I speak of what actually was cultivated. I think nearly all of it could have been ploughed and cultivated.

About 140 acres of the 320 lies west of the road. There is no fence along the west side of the slough. There was one there, I think, in 1873. I think Mr. Hayden had it put there. I wanted to rent the upland of Rachael Dove land, lying west of the road, in 1873, for pasture. Mr. Hayden asked me $200 per year.

L. C. PERRY.

B. Dove is recalled as a witness for the complainant, and testifies as follows:

This plat is a part of the Dove donation land claim.

(Complainants offer in evidence the said plat, which is filed herewith, marked Exhibit G.

Complainants offer in evidence copy of answer in case of Rachel Dove vs. Ben. Hayden, in Polk County circuit court. The same is filed herewith, marked Exhibit H.)

313 I got a contract with T. J. Baxter for logs, as he testifies. He owed me $300. I sent him to see Mr. Hayden, to see if he would take it as a payment on this place he bought at sheriff's sale. Baxter came back and told me that Hayden was all right; that he would pay it. That was some time, I think, along in January or February, 1865. When Baxter came back he told me that Hayden was all right, and that he would take the money, and I didn't know any different until he sent me word to stop cutting logs; then I went to see Hayden myself, and he told me that Baxter didn't pay him the money, and I must quit cutting timber. This $300 was to be applied on the bid that he had made upon the land at sheriff's sale—my wife's land. Mr. Hayden, when he forbid my cutting logs, said it was a difficult matter for my wife to hold the land against my debts, and he would give her a hundred head of sheep and the rent of the place that year if she would sign him a quitclaim deed.

314 I would say about Mr. Hayden writing that mortgage that one instrument of writing is the same to me as another. I can't read or write. He was there either a day or two days before the mortgage was written, and I gave him the receipt that Ford had given me of the survey, containing a description of the land, and Hayden wrote an instrument of writing of some kind, and talked about the mortgage, and I thought it was the mortgage he was writing. He took a copy of that description of the survey.

Neither my wife nor I can read or write. That instrument of writing

Hayden wrote was given to me, and I gave it to my wife, and she laid it up in the cupboard and gave it to Boothby the next morning.

P. C. Sullivan has no interest in this suit now, either a' attorney or otherwise. He had no interest in the suit of Rachel Dove vs. Ben. Hayden, in Polk County circuit court. He had been att'y in counselling me before the case was brought.

315 The way he came to examine the records in the Griswold case, to see about the payment of that $1,000, was that he was engaged in a suit for me against James Jones for my part of the donation land claim.

It has been two or three years since Sullivan told me that he had examined the papers in the Griswold case, and found that Hayden had received a thousand dollars which he had not accounted for.

He told me there were receipts and accounts of property sold at sheriff's sale enough to pay the judgment without that thousand dollars that I had given to Hayden, and that there was no such a credit on the records.

There was an instrument of writing got up at Dallas by Sullivan, which he stated that Hayden had agreed to arbitrate this case. My wife signed it—put her mark to it. Sullivan said that Hayden had signed it. Not quite half of the Rachel Dove land lies west of the road—about 140 acres. The bottom lands are divided by the slough and timber.

316 There is about 45 acres of cultivated land in the west side of the slough, and 40 on the east side of cultivated bottom land.

When I farmed the upland it averaged about 20 bushels of wheat to the acre, and the bottom land at least as much as 30 bushels, as long as I farmed it. Rents have commonly been ⅓ of the crop in that region.

I rented the place to Smith for ⅓. The upland then had not been cultivated for two or three years, and he spoke about it, and he said it wasn't worth as much as if it had not been cultivated. I told him it was in first-rate order for wheat, and he and I rode over it and looked at it, and he agreed to put in a hundred acres of it and pay me one-third rent. He didn't cultivate any of it, however.

his
B. + DOVE.
mark.

317 G. W. Lawson is recalled as a witness for the complainant.

Exhibit F is a true copy of the original receipt of Mr. Hayden given for the two hundred dollars. That was taken by me at the time of the date of the copy. It is in my handwriting, and was taken by me as a matter of precaution in case of the loss of the original.

Exhibit H is, according to the best of my belief and recollection, a true copy of the original answer filed by Mr. Hayden in the suit in Polk County between Rachel Dove and himself, and is an answer to the amended complaint, I think.

This copy, to the best of my knowledge, information, and belief, was made out by the clerk or deputy clerk of Polk County at the request of Mr. Williams, for the purpose of drawing a reply, at Portland, Oregon. Mess. Williams & Thayer passed it over *the* the firm of Hill, Durham & Thompson after they were employed in the present suit,
318 and I found it in this office together with other papers in this
cause. I would state further as a reason for believing this is a true copy of the answer that it contains two statements of which Mr. Hayden was examined in cross-examination of the case.

My reasons for that belief is that M'rss. Williams & Thayer and myself talked over these two points and remarked that we thought they admitted away a good deal of Mr. Hayden's case, and afterwards, when the original papers were all lost in that case, we thought they might have been lost to get rid of those concessions in the answer.

G. W. LAWSON.

Wm. Jones is called as a witness for the complainant. Being duly sworn, he deposes as follows:

My name is Wm. Jones; live in Polk County; am 46 years old.

I know the def't; am well acquainted with him. I had a conversation with Ben. Hayden about six years ago at Eola. It came up
319 by Hayden offering her a certain amount of sheep to her for a
quitclaim deed. I had tried to get the Doves to accept Hayden's proposition. I told them I didn't think they would get anything out of it.

Mr. Dove came to me before the land was sold and told me they were broke up, and that it was the old woman's half of the claim, and they wanted a home. I don't know that I told him I wouldn't bid against the land, but I thought it over and concluded not to do it.

I found out what the mortgage was, and it was $2,700, and that was the sum I intended to make the land fetch. I would have given that sum for it. I think Ben. Hayden understood that I would have bought the place for that. I wouldn't be positive that I ever told Ben. at any particular time that I would have paid $2,700 for the place. I considered the farm—Mrs. Dove half—to be worth about ten dollars an
320 acre. It was understood that this mortgage was payable in
greenbacks.

WM. JONES.

Mr. Kennedy is recalled as a witness for the complainant, and testifies as follows:

There was an indictment found against me in the fall or winter of 1869. I had moved to Eastern Oregon, Union County, and in Dec. or Jan. after the sheriff of Union County served a summons on me to appear before a justice in the neighborhood to give security for my appearance at the spring term of court in 1870 of Polk County. I came down in the spring of 1870, and brought two of my sons and two other men who were acquainted with my business. I understood it was an indictment for perjury in not giving in my property correctly to the assessor. I saw the prosecuting att'y and told him of the case, and cited him to witnesses, and cited him to certain men there in Dal-
321 las who were going to swear against me maliciously. The case
was called up and dismissed. The prosecuting att'y told me he didn't believe the charge when it was first brought up, but being an officer he had to discharge his duty. He said he knew the men who were prosecuting me, and knew their disposition, and knew they were prosecuting me maliciously. I never understood that the case was dismissed because Mr. Ford died, but because the prosecuting att'y was satisfied there was no case.

Judge Hayden was my att'y in the cause. The indictment came about in this wise. My wife and I were down in Eola, and we were on our way home, and Mr. Ford came out of the store there at Dixie. He said to me, "I want to assess you." Says I, "Mr. Ford, you let me go home, and let me make out a list of my property, and then I am willing to be qualified to it." I knew he was my enemy, and would do anything to

injure me. He has sworn lies against me, and is a terrible,
322 bad man. Everybody that knows him knows that. He said no;
he wanted to assess me then. Then says I, "Ford, if you will assess me, I will not swear to it, because I can't be perfectly certain of it unless I have time to make out a list of my property." He said "That don't matter. State it as near as you can." I told him, "If you will assess me here, I won't swear to it." He said, "As near as you can." Then I gave in so much. (I forget now the amount.) Then he asked "How much are you in debt." I told him I had bought a farm in Union County, and had given my note for it. He said that Collins, the county judge, had told him not to let me take out my indebtedness without I owed it in Polk County.

Judge Hayden was standing near by, and I called to him. Says I, "Ben, how is it; haven't I a right to take out my indebtedness." He said I had a right to, no matter where I owed it. I then drove off. My
two sons were with me. They had property of their own. He
323 didn't assess them. I didn't swear to the assessment.

M. KENNEDY.

Jasper Kennedy is called as a witness for the complainants. Being duly sworn, he deposes as follows:

My name is Jasper Kennedy. I am 29 years old. I live in Polk County. I am a son of Mr. Kennedy who just testified. I was present with my father on the occasion of which he speaks, when he was assessed by Mr. Ford in Polk County in 1869. I was on the road, and saw Mr. Ford stop my father. My father told him he was not prepared to give in his property there at all. My father told him he wouldn't swear to any assessment, unless he would let him go home and make out a list; that his boys owned property in there as much or more than he did. Ford told him that made no difference, to give it in just
as near as he could. He assessed him then, but my father wouldn't
324 swear to it. I was there when Mr. Hayden was asked about it—
about the indebtedness. Mr. Hayden told him he a right to take out his indebtedness. My father did not swear to the assessment. He gave in then more property than he actually had then, the way I looked at it. It was for swearing to the assessment at this time and place that my father was indicted.

JASPER KENNEDY.

John Osborne is called as a witness for the complainant. Having been duly sworn, he testifies as follows:

My name is John Osborne. I reside in Polk County; am 46 years old. I am acquainted with a portion of the Rachel Dove donation claim. My place joins the west end of Rachel Dove's claim. I came there in the summer of 1864. I can't say that I was very well acquainted with it at that time. I am only well acquainted with the upland at
the west end.

325 The customary rent in Polk County for land is one-third of the
crops, and has been since I can remember. I would say that since 1865 I have sold wheat every year at an average of eighty cents a bushel. I don't know the general average production of that land. I think that mine adjoining hers would fairly average 20 bushels of wheat to the acre. Mine is upland like hers. The supposition generally was at the time that Judge Hayden bought the Dove's place that it was not exactly a clear title; that there was an heir's interest there

somewhere. It was understood that the north half was the husband's and south half the wife's, but when it was examined at the land office it was found out that the south half was set apart to the husband by the patent. I have a deed that Homebuckle gave me, executed by J. V. B. Butler to Homebuckle, for the north half of the Dove's
326 claim reciting a consideration of $3,000. It was executed in Nov., 1860.

I gave eight hundred dollars for the east quarter of that north half of Davis' claim and 14 acres of timber besides. I think the north half of the Davis claim was the better half, though others might think differently.

JOHN OSBORN.

F. A. Patterson is called as a witness for the complainant. Being duly sworn, he deposes as follows:

My name is F. A. Patterson; I reside in Polk County; I am 41 years old.

I am somewhat acquainted with a portion of the Rachel Dove donation claim. I lived about a half a mile from the west end of her claim.

Land rents there for one-third of the crops, so far as I know. I am a farmer. The average value of wheat for the last fourteen years I have no certain knowledge of.

I would judge it to be from 75 to 80 cents, may be a little more per bushel. My farm is upland prairie, called prairie land.
327 I think my land has averaged for the last 13 years about 20 bushels to the acre of wheat, may be over that.

I own a quarter section of the Davis donation claim—the west half of the north half. I paid ten dollars an acre for it. I bought it the last of January or the first of February, 1865. It is prairie land, similar to other prairie land thereabout and similar to the prairie land or upland of Rachel Dove's claim. I never understood there was any defect to the title of the Davis land, but it was understood there was an heir owning an interest. Davis' title was not considered good to the whole of the claim.

F. A. PATTERSON.

S. Becket is called as a witness for the complainant. Baving been duly sworn, he deposes as follows:

My name is S. Becket; I reside in Polk County; am 51 years old. I know the Rachel Dove donation claim. I live about 3 miles from there. I worked a portion of the claim at one time.
328 I suppose I worked about thirty acres of it. That was in 1863 and in 1864.

I think the next year Mr. Dove worked it himself. It was good land; bottom land. I think it averaged about 20 bushels of wheat to the acre. I had a partner at that time. We rented of Mr. Hayden, and were to have two crops for doing certain work on the place. In 1864 wheat was worth a $1.00 a bushel. We had only a small crop the first year. In 1864 or 1865 wheat was high, as much as two dollars a bushel.

S. BECKET.

Statement by the examiner.

The foregoing rebutting testimony from and after page 191 was taken pursuant to an agreement between the parties made on the 15 day May, at the close of the defendant's testimony.

At that time, in the presence of complainant's counsel and of the defendant and his counsel, J. J. Daly, esq., and E. C. Bronaugh, esq., it was agreed before me that I should fix upon a day for taking the
329 rebutting testimony at Salem. I thereupon set Thursday, the 23 day of May, at one o'clock p. m., and stated if I found it necessary for any reason to postpone the hearing from that day, to which all assented.

Upon Friday, the 19th, I sent a subpœna to Mr. Lawson, of complainant's counsel, in which by inadvertence I placed the date of hearing at Thursday, the 29th, intending to have Thursday, the 23. Recalling this mistake upon the following day I wrote at once to Mr. Lawson requesting him to change the date in subpœna to the 23. This letter was received by Mr. Lawson on Monday, the 20th, at noon. Mr. Lawson replied by mail on the same day, asking me to set the hearing for the 27th. I telegraphed back to him to the effect that if it was impossible for him to be ready by the 23 I would proceed upon the 27. Mr. Lawson replied by letter that having made other arrangements he could not be ready to proceed before the 27th. Upon the 22 I notified Judge Bronaugh personally that the time had been postponed until the 27th,
330 to which he made no objection. I then upon the 23 wrote J. J. Daly at Dallas, and to the def't at Eola, Polk County, advising them of the postponement to the 27. Mr. Lawson had informed me before this that he had notified Mr. Daly of the postponement. The letters to Mr. Daly & the def 't were written by me at the request of Judge Bronaugh. I had never seen the stipulation of parties in regard to the time for taking testimony. It was filed with the clerk, and I never was informed of its terms.

Upon the 27, at the time and place of hearing, the def't appeared in person, and requesting me to make no entry of his appearance in the case asked me to postpone the hearing an hour until he could confer with his counsel, claiming that the time for taking testimony had expired.

I postponed the hearing for an hour and then until next morning. The next morning I took the testimony. The def't being present in the room and having counsel present to take notes of testimony, stated that he made no appearance in the cause, and declining to cross-examine the witnesses.

331 I offered to postpone the hearing until the 29, to give the def't time to get his counsel who had had charge of the case, but he declined.

Portland, May the 31, 1878.

W. B. GILBERT,
Examiner.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, W. B. Gilbert, hereby certify that the foregoing testimony in the above-entitled cause of Chas. Manning, plaintiff, vs. Ben. Hayden, defendant, was taken before me, beginning on the 3' day of January, 1878, and continuing from day to day, as shown by the entries in the foregoing depositions.; that the plaintiff appeared by Mess. Hill, Durham & Thompson, and G. W. Lawson, and the def't by E. C. Bronaugh and J. J. Daly and in person; that the witnesses named in said depositions were each by me duly sworn to tell the truth and the whole truth, and nothing but the truth, and their said testimony was by me

332 reduced to writing as given, and by me read over to *to* the said wit*i*ness, and by them each duly subscribed in my presence.

In witness whereof I have hereto set my hand this 25 day of October, A. D. 1878.

W. B. GILBERT,
Examiner.

(Endorsed:) Filed Oct. 25th, 1878. R. H. Lamson, clerk.

333 EXHIBIT A.—W. B. GILBERT, *examiner.*

Copy of demand.—("A" exhibit.)

SALEM, *April 18th*, 1874.

Hon. BEN. HAYDEN,

DEAR SIR: For a long time Mr. P. C. Sullivan had a supposed case in his hands against you and in favor of the wife of Bethuel Dove. Mr. Sullivan having finally declined to proceed with the case, and having previously taken me in with him in the case, leaves it all to me, and I have concluded to drop you a few lines regarding the matter, and particularly because I understood from Mr. Sullivan that he had seen you about it and you did not seem to consider that Mrs. Dove had much of a case. The claim made by Mrs. Dove is that you, acting as her adviser and att'y at law, purchased or bid in for her at sheriff's sale, but in your own name, her donation land claim of 320 acres, the S. ½ of donation claim No. 54, not. claim No. 1441, in Polk County, Oregon; that your
bid was for something about $1,225 in greenbacks, worth 50 cents
334 to the dollar; that you paid off the bid and she paid you $200 in
coin on your bid; that you afterwards got possession of the premises, and had ever since received the rents and profits, worth, as she supposes, some $400 per year; that you have been more than paid the money you advanced for her and all reasonable att'y's fees, and her demand is that you convey to her her said land, and settle and account with her for the rents and profits of her land and pay her the balance over after deducting all your reasonable fees, advances of money, and interest on the money by you paid.

Not knowing what your side of the case is I will, for the present, for her and in her name, make this a statement and demand of and upon you for the property and accounting aforesaid preliminary to suit for their recovery. The basis of her right that you hold her property in trust, as her att'y, and must restore it under the terms and equities of that confidential and trust relation. Hoping to see you soon in regard to this matter,

I am truly yours, &c.,

G. W. LAWSON,
Att'y for Mrs. Rachel Dove.

Copy, April 18th, 1874.

335 B.

Know all men by these presents that Bethuel Dove and Rachel Dove, his wife, in consideration of five thousand dollars, the receipt of which is hereby acknowledged, do hereby bargain, sell, and convey to Cha's Manning, the following described parcel of real estate, to wit:

The south half of the donation land claim of said Bethuel Dove and

Rachel, his wife, certificate No. 4494, not No. 1441, the whole claim being described as claim No. 54, in sections 34 & 35, in T. 7 S., 4 W; & claim 59, in sections 2 & 3, T. 8 S., R. 4 W., all in Polk County, Oregon, containing in all 638.$\frac{23}{100}$ acres; this conveyance being of the south half (or 319.$\frac{11.50}{10000}$ of the same, more or less)—the wife's half of said claim, together with all our estate, 'right, title, interest, claim and demand at law or in equity, present or in expectancy, in and to the said premises, and all the estate, right, title, interest, *right*, claim, and demand of every name and nature whatever of either of us, to have and to hold the same unto the said Cha's Manning, his heirs, and assigns forever. (B.)

336 In witness whereof we have hereto set our hand and seal the 7 day of April, 1875.

B. + DOVE. [L. S.]
R. + DOVE. [L. S.]

Executed in presence of—
A. B. E. REISS.
J. P. IRVINE.

STATE OF OREGON,
Polk County, ss:

This certifies that on this 7 day of April, 1875, before me, the undersigned, personally appeared the with'-named Bethuel Dove and his wife, Rachel Dove, know' to me to be the persons discribed in and who executed the within instrument and acknowledged the same to be their free act and deed; and the said Rachel Dove, his wife, on examination, separate and apart from her said husband, acknowledged to me that she executed the same freely and without fear or compulsion from any one.

Witness my hand & seal this 7 day of April, A. D. 1875.

J. P. IRVIN,
Justice of the Peace.

STATE OF OREGON,
Count' of Polk, ss:

I certify that the within was received and duly recorded by me in Polk County records, Book 9 of deeds, page 307, on the 8th of April, A. D. 1875. W. S. Frink, county clerk. Exhibit B.

W. B. GILBERT, *Examiner.*

337

C.

Donation Certificate No. 4494.—*Notification No.* 1441.

Whereas in conformity with the provisions of the 7 section of the act of Congress, approved Sept. 27, 1850, entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the public lands, and the amendments thereto, Bethuel Dove and his wife, Rachel Dove, of the county of Polk, in the State of Oregon, claiming a donation right, in virtue of the act aforesaid, to the following tract of public lands known and designated in the surveys and plats of the United States as the claim No. 54, being parts of sections 34 & 35, in T. 7 S., R. 4 W., and claim No. 59, being parts of sections 2 & 3, T. 8 S., R. 4 W., bounded and discribed as follows: beginning a point 19.50 chains east of the

SW. co'ner of said section 34, and running thence north 14.52 chains, thence S. 81° E. 12.30 chains, thence north 15.60 chains, thence east 102.25 chains, thence S. 57.33 chains, thence west 114.07 chains, and thence N. 29.50 chains to the place of beginning, containing 638.23
338 acres—the north half to the said Bethuel Dove, and the S. half
to his wife, the said Rachel Dove having proven to the satisfaction of the register & receiver of the Walla*net* district, Oregon, the fact that such settlement was commenced in the first day of Dec., 1848, four years prior to the date hereof, and having, in pursuance to the requirements of the 7th section of the act aforesaid, established by two disinterested witnesses the fact of continued residence and cultivation by the said act: Now, therefore, be it known that we, Owen Wade and Henry Warren, register and receiver of public lands in said district, do hereby, and pursuant to the 7th section of the act aforesaid, certify to the Commissioner of the General Land Office the facts aforesaid, accompanied by the evidence thereof, in order that a patent may be issued to said claimants for the tract of land described as required by the 7 section of the act aforesaid, provided that the said Commissioner shall find no valid objection thereto.

Given under our hands at the land office at Oregon City, Oregon, this 15th day of September, 1874.

OWEN WADE, *Register.*
HENRY WARREN, *Receiver.*

Donation certificate No. 4494, Bethuel Dove & wife. Exhibit C.
W. B. GILBERT, *Examiner.*

339 D.

Be it remembered that at a regular term of the circuit court of the State of Oregon, for the county of Polk, began and holden at this courthouse, in said county, on Monday, the 16' day of November, A. D. 1863, the following proceedings were entered of record, to wit:

Present, Hon. R. P. Boise, judge; Rufus Mallony, pros. att'y; W. C. Whitson, clerk; & I. M. Butler, sheriff.

J. EMMONS, TREAS. POLK COUNTY, OREGON,
vs.
BETHUEL DOVE & RACHEL DOVE.
} Wednesday, Nov. 18, 1863.

Now, at this day comes the above-named pl'ff, by Mallory, his solicitor, and the said def'ts, by Hayden, their solicitor*s*, and this cause came on to be heard on the complaint and the demur'er of the def'ts' and after hearing the allegations and arguments of counsel it is considered by the court that said demur'er be overruled; and the said def'ts failing to answer said complaint, it is considered by the court
that said complaint be*ing* taken for confessed, and it appear-
340 ing to the court that there is due on the promissory note upon
which this *note* is brought the sum of $2,052.75, it is therefore ordered and adjudged by the court that the pl'ff have and recover of the said defendants the said sum of two thousand fifty-two and $\frac{75}{100}$ dollars, the same being the amount named in the summons filed in this cause, and for his costs and disbursements for this behalf expended, and that he have execution therefor; and it further appearing to the court that at the time of the execution of the note described in said complaint the said def'ts, in order to secure the payment of said note, executed and delivered to the said pl'ff a mortgage upon the following

described real estate, to wit, the south half of Bethuel Dove's donation land claim No. 59, in T. 8 S., R. 4 W. of the Wallamet meridian, notification No. 1441, in Polk County, Oregon Territory:

It is therefore ordered, adjudged, and decreed by the court that the said premises be sold as upon execution at law, and that the proceeds
of said sale be applied to the payment of the said judgement, and
341 the overplus, if any there be, be paid to the said defendants, and
that the said def'ts be forever foreclosed of their right to said
premises, and that the report of the sale of said premises be returned into this cou't at the next term thereof.

R. P. BOISE, *Judge.*

EXHIBIT D.—W. B. GILBERT, *examiner.*

In the circuit court of the State of Oregon for the county of Polk.

STATE OF OREGON,
County of Polk, ss:

W. S. Frunk, clerk of said circuit court, hereby certify that the foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original journal entry in the above-entitled action, as the same appears of record in my office.

I' witness whereof I have hereto set my hand and affixed the seal of said circuit court this 13' day of March, A. D. 1878.

[SEAL.] W. S. FRINK, *Clerk.*

E.

Be it remembered at a regular term of the circuit court of the State of Oregon, for the county of Polk, began and holden at the court-house
in Dallas, in said county, on Monday, the 25th day of April, A.
342 D. 1864, and from day to day thereafter during the continuance
of said term.

Present, Hon. R. P. Boise, judge.
" " W. C. Whitson, clerk.
" " I. M. Butler, sheriff.
" " R. Mallory, pros. att'y.

When the following proceedings were had and entered of record, to wit:

J. EMMONS, TREASURER POLK COUNTY, OREGON,
vs.
BETHUEL DOVE & RACHAEL DOVE.
} Tuesday, April 26, 1864.

Now, at this day comes the said pl'ff, by Mallory, his att'y, and moves the confirmation of sale of the real estate heretofore made and returned into this court to Benjamin Hayden, and there being no objection filed thereto,

It is ordered that said sale be confirmed.

R. P. BOISE, *Judge.*

343 In the circuit court of the State of Oregon for Polk County.

STATE OF OREGON,
County of Polk, ss:

I, W. S. Frink, clerk of said circuit court, hereby certify tha the foregoing transcript has been by me carefully compared with and is a true copy and the whole thereof of the original order of court in the above-entitled action, as the same appears of record in my office.

Witness my hand and the seal of said circuit court at my office in Dallas this 13th day of March, A. D. 1878.

[SEAL.] W. S. FKUNK, *Clerk.*
Exhibit E.

344 F.

"Received of B. Dove two hundred dollars, to be applied on purchase*d* of land by me at sheriff's sale. The land know' as Mrs. Dove' half of donation land claim.

"July 26, 1864.
(Signed) "B. HAYDEN."

The above is a true copy of the original receipt now in my hands as att'y for Mrs. Dove.

Given July 27, 1874.
G. W. LAWSON, *Att'y.*

F. Exhibit F 1. Filed May 10, 1878.

345 H.

In the circuit court of the State of Oregon for Polk County.

RACHEL DOVE
vs.
BEN. HAYDEN.

And now comes the said def't, Ben. Hayden, and for answer to the said plaintiff's complaint—

Denies that he was employed for said plaintiff and her said husband in said foreclosure suit, and denies that he filed a demur'er for both def't therein, or appeared or defended therein, except to file a demur'er therein for one of said defendants, or for any purpose except to obtain time.

Denies that he was an attorney for or of either said Rachel Dove or her said husband at any time after the entry of said decree in said foreclosure suit.

Denies that he was an attorney in said suit after that time.

Denies that he ever promised or agreed to purchase said land
346 or any part of it for said plaintiff.

Denies that this defendant's said purchase of said premises was in violation of his promise or agreement, or any promise or agreement, or in violation of defendant's duty as an att'y, or in violation of any duty.

Denies that either this def't's said purchase, or his causing said land to be sold to him, or his procuring the same to be conveyed to him by the said sheriff was either fraudulent, wrongful, or in violation of any right, duty, or trust, and denies that he has ever continued, or intended or done any act contrary or intending to wrong or defraud the said plaintiff.

Denies that he has ever fraudulently or wrongfully taken hold or claim' said land, and that his claim to said land under said sheriff's sale in his own right and to his own use and benefit is fraudulent or wrongful*l*.

Denies that said plaintiff ever paid said Hayden $200, or any sum, to apply in part or otherwise in redemption of said land under
347 said sale or otherwise.

Denies that said plaintiff ever received said sum or any sum to apply on such redemption, or any redemption, of said land.

Denies that said defendant ever agreed that said plaintiff might redeem said lands from said sheriff's sale within one year, or within any time, and denies that said plaintiff ever obtained or had any right to redeem said land from said sales except the right to redeem given by statute.

Denies that said *defendant* ever paid said sum of $200, or any sum, to said defendant in any manner or for any purpose, except in the manner and for the purpose hereinafter set forth. Denies at the time of said sheriff's sale the said was worth more than $1,225. Denies that the use of or the rent value was more than $200 per year during any time, and denies that the said currency paid by said defendant for said land was worth no more than 50 cents on the dollar, and avers that the same was current money of the United States and worth one hundred cents on the dollar.

348 Said defendant also denies that said plaintiff has ever offered to redeem said lands, or any part thereof. Denies that said defendant ever wrongfully or fraudulently obtained possession of said land, or of said premises, or any part thereof, in the year 1865, or at any other time, or ever wrongfully or fraudulently held or now holds possession thereof.

Denies that by reason of the taking and holding of said land, or the withholding thereof, or by the reason of any of the matters or things set forth in said complaint, the said plaintiff has been damaged in any sum. Denies that the def't took possession of the said land prior to April, 1866. Denies that the aggregate value of the rents and profits mentioned in said complaint with the said $200 is more than or as much as the amount paid by the said defendant upon his said bid. Denies that the same are worth as much as the permanent improvements made on the said land by this defendant, and denies that he has been repaid any part of the expended by him on said bid or for said improvements.

349 Denies that said defendant purchased said lands as agent, attorney, or trustee of said plaintiff, and denies that said plaintiff is now or has been at any time the equitable owner of the said land.

And for further answer to the said complaint the said def't says that the only employment or engagement that ever existed between himself and the said plaintiff or her husband in relation to the said foreclosure suit was the following: Either the said def't or her said husband had or could make any defence in or to said foreclosure suit, and said def't was employed solely for the purpose of filing said demurrer, and solely for the purpose of postponing the time of taking said decree, and the facts in said suit admitted of no defence, and that when said decree was entered in said suit all his duties as an att'y in said suit had been fully performed, and upon the entry of said decree this def't ceased to be the att'y of the said pl'ff or her said husband, and from that time to the present this def't has not or agreed to be an
350 agent or att'y or trustee for either said pl'ff or her husband.

And this def't never was requested to bid off or purchase said lands for said pl'ff or her husband, and never promised or agreed to do so. That the said land was duly offered for sale by said sheriff under said decree *and* the 24' day of Feb., 1864, and then for want of bidders said sale was duly adjourned to the 27' day of said Feb., and on the day last aforesaid, for like cause, it was duly adjourned to the said 3d day of March, A. D. 1864, when solely, in his own right, and for himself, and without direction or request from said pl'ffs, this def't purchased the said parcel of land at public auction under said decree, and paid therefore the sum of $1,225 in current money of the United States, which sum was the actual value of the said land; and afterwards, at a regular term of said court, said sale to this def't was duly confirmed 351 by the said circuit court; and afterwards, on the 20th day of April, 1864, more than sixty days having elapsed since said sale was so confirmed and no redemption having been made, the said sheriff of said county duly executed and acknowledged and delivered to this def't a deed, in pursuance of this said decree and sale, conveying the said land to this def't in fee, and thereupon the said defendant became and is owner in fee of said premises in his own right and to his sole use and benefit, and the said pl'ff continued to occupy said premises not only from the said sale to the expiration of the said 60 days for redemption but for one year thereafter; and the reasonable worth of said premises during that time is $200, and said plaintiff '*c*came indebted to said def't for the use and occupancy of said premises in the said sum of $200; and afterwards, in the year 1866, the said pl'ff left and abandoned the possession of said premises, and thereafter 352 the said def't entered into possession and has continued and is still in possession thereof, and since said def't so entered on said premises in 1866 he has made permanent improvements on said premises that are now of the following value, namely:

Said def't has broken up 100 acres of new land, at a cost of $3 per acre, which improveme't is now of the value of $300, and has put into fence on said land good rails at a cost and now worth on said land $4 per hundred—$360; and has built a house on said land now worth $250; and has put repairs on the house on said place at a cost and of the present value of $50, all of which are permanent improvements and are now on said land and are worth $960. And the said defendant further says that all the right and equity of the redemption of the said pl'ff in said land has long since ceased. This def't further says that after def't's said purchase of said land and while said pl'ff was so as aforesaid in possession thereof the said pl'ff cut and d*i*stroyed 353 timber growing on said land to the amount and of the value $500; and this def't admits that he received the $200 mentioned in the said complaint, but he says that the same was paid to and received by him from the said pl'ff and her said husband as rent for the use and occupancy aforesaid of said land, and no other account and for no other purpose. And the said def't further says that he is justly and legally the owner of sai l parcel of land in fee. Wherefore said def't prays that by the decree of this court the said def't may be decreed to be the owner in fee of said land, and said def't p*ar*ys for such other and fu'ther as to equity belongs.

R. P. BOISE & W. W. UPTON,
Att'ys for Def't.

STATE OF OREGON,
County of Polk:

Ben. Hayden, being duly sworn, depose, and say that the foregoing answer is true, as I verily believe.

BEN. HAYDEN.

(Endorsed:) Copy of answer. Exhibit H.

354 EXHIBIT Q.

This indenture, made this the 20th day of April, A. D. 1864, between I. M. Butler, sheriff of the county of Polk, and State of Oregon, of the first part, and Benjamin Hayde, of the county and State aforesaid, of the second part. Whereas by virtue of an execution issued out of and under the seal of the circuit court of the third judicial district of the State of Oregon, for the county of Polk, tested the 8' day of January, A. D. 1864, said execution was issued upon a judgment by a decree of foreclosure of a mortgage in said court on the 18th day of Nov., A. D. 1863, in favor of J. Emmons, treasurer of Polk County, and against Bethuel Dove & Rachel Dove to the said sheriff directed and delivered, commanding that out of the personal property of the said judgement debtors in his county he should cause to be made certain monies in the said execution specified, and if sufficient personal property could not be found that then he should cause the amount of said judgment
to be made out of the real property of said defendants, or the
355 premises mortgaged by the said defendant, which was foreclosed
on the day and date above written; and whereas sufficient personal property of said judgement debtors could not be found whereof he, the said sheriff, could cause to be made the monies specified in said execution, he, the said sheriff, did, in obedience to said command, levy on, take, and seize all the estate, right, title, and interest which the said judgment debtors so had of, in, and to the lands, tenement, real estate, and premises hereinafter particularly set forth and described, with the app*ertin*ences, and did, on the 20th day of February, A. D. 1864, proceed to the place of sale, but for the lack of bidders and other sufficient cause, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of said day, postponed the said sale by public proclamation for one week, to wit, on the 27th day of *of* said month, and for same causes I did, on said day, between the hours of 9 o'clock a. m. and 4 o'clock p. m., by
public proclamation, adjourn the said sale for one week, to wit,
356 on the 5' day of March, A. D. 1864, at which time I did sell
the said premises at public auction, as is required by law, to Benjamin F. Hayden, for the sum of twelve hundred and twenty-five dollars, he being highest bidder, and the said sum being the highest sum bidden, and the whole price being paid for the same, and whence the said sheriff, after receiving from said purchaser the said sum of money so bidden as aforesaid, *given* to him such certificate as is by law required to be given, and filed in the office of the county clerk of Polk County a duplicate of such certificate; and whereas sixty days having expired from the date of the order confirming the sale, and no redemption having been made: Now, this indenture witnesseth that I, I. M. Butler, the sheriff aforesaid, and party hereto of the first part, by virtu*t*e of the said execution and in pursuance of the statute in such cases
made and provided, for and in consideration of the sum of money
357 above mentioned, in hand paid as aforesaid by the said party of
the second part, the receipt whereof *is hereof* is hereby acknowledge', hath granted, bargain', sold, conveyed, and confirmed, and by these present, doth grant, bargain, sell, convey, and confirm unto the said Ben. F. Hayden, his heirs and assigns, all the estate, right, title, and interest of said Bethel & Rachel Dove which they had on the 18th day of Nov., A. D. 1863, or at any time afterwards, of, in, and to all the following-described premises, to wit: The south half of Bethuel Dove's land claim No. 59, No. 1441, in T. 8 S., of R. west of the Wallamet meridian, together with all the hereditaments and appertenance' thereunto be-

longing or in anywise appertaining: to have and to hold the above-mentioned premises with the appurtenances unto the said Benj. F. Hayden, his heirs and assigns forever, as fully, absolutely, as he, the said sheriff aforesaid, can, may, or ought to, by virtute of the aforesaid execution and of the statute in such cases made and provided, grant, bargain, sell, convey, release, and confirm the same.

358 EXHIBIT No. 1.

This indenture, made this second day of March, A. D. 1859, between Bethuel Dove and Rachel Dove, his wife, of the county of Polk, O. T., of the first part, and William P. Lewis, treasurer of Polk County, Oregon Territory, of the second part: witnesseth

That the party of the first part, for and in consideration of the sum of fifteen hundred and fifty dollars to them in handpaid, the receipt whereof is hereby acknowledged, have bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do bargain, sell, alien, release, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all that portion, part, and parcel of land described as follows, to wit: The south half of Bethuel Dove's land claim No. 58, in township 8 south, range 4 west, and claim No. 54, township 7 south, range 4 west of the Wallamet meridian, notification 1441, in Polk County, Oregon Territory, together with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and
359 also all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever of the said party of the first part of, in, and to the same, and the revision and revisions, remainder and remainders, rents, issues, and profits thereof; to have and to hold the hereinbefore-granted bargains and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. This conveyance is intended as a mortgage to secure the payment of the sum of fifteen hundred and fifty dollars, according to the tenor and effect of a certain promissory note executed by Bethuel Dove to William P. Lewis, treasurer of Polk County, for the benefit of common schools, bearing twelve per cent. interest, said interest to be paid semi-annually in advance, the principal to be paid three years after date, said note bearing even date with this mortgage. But in case default shall be made in the pay-
360 ment of the principal or interest, as above provided, then the party of the second part, his executors, administrators, and assigns are hereby empowered to sell the premises above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the party of the first part, their heirs or assigns. And the said Bethuel Dove, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money and interest, as above mentioned.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

his
BETHUEL + DOVE. [SEAL.]
mark.
her
RACHEL + DOVE. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
GEORGE BOLTER.
P. R. BOOTHBY.
THEODORE INGALLS.

361 TERRITORY OF OREGON,
County of Polk, *ss*:

On the second day of March, A. D. 1859, before the undersigned, a justice of the peace, came the above-named Bethuel Dove and Rachel Dove, his wife, who are known by me to be the identical persons described in and who executed the foregoing conveyance, and acknowledged that they had executed the same; and the said Rachel, on an examination separate and apart from her said husband, acknowledged that she executed the same freely and without compulsion from any one.

PEARSON R. BOOTHBY, *J. P.*

TERRITORY OF OREGON,
County of Polk, *ss*:

I hereby certify this mortgage duly recorded in Polk County, records book A of mortgages, on pages 137, 138, & 139, this 2d day of March, 1859.

LUCIEN HEATH,
Recorder.

(Endorsed:) Exhibit No. 1.

361½ EXHIBIT NO. 1.

This indenture, made this second day of March, A. D. 1859, between Bethuel Dove and Rachael Dove, his wife, of the county of Polk, O. T., of the first part, and William P. Lewis, treasurer of Polk County, Oregon Territory, of the second part, witnesseth:

That the party of the first part, for and in consideration of the sum of fifteen hundred & fifty dollars to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do bargain, sell, alien, release, convey, and confirm, unto the said party of the second part, his heirs and assigns forever, all that portion, part, and parcel of land described as follows, to wit: The south half of Bethuel Dove's land claim No. 59, in township 8 south, range 4 west, and claim No. 54, township 7 south, range 4 west of the Wallamet meridian, notification 1441, in Polk County, Oregon Territory, together with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and also all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever of the said party of the first part of, in, and to the same, and the revision and revisions, remainder and remainders, rents, issues, and profits thereof; to have and to hold the hereinbefore-granted bargains and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever.

This conveyance is intended as a mortgage to secure the payment of the sum of fifteen hundred and fifty dollars, according to the tenor and effect of a certain promissory note executed by Bethuel Dove to William P. Lewis, treasurer of Polk County, for the benefit of common schools, bearing twelve per cent. interest, said interest to be paid semi-annually in advance, the principal to be paid three years after date, said note bearing even date with this mortgage.

362 But in case default shall be made in the payment of the principal or interest as above provided, then the party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the premises above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the party of the first part, their heirs or assigns. And the said Bethuel Dove, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money and interest as above mentioned.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

his
BETHUEL + DOVE. [SEAL.]
mark.

her
RACHEL + DOVE. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
GEORGE BOLTER.
R. R. BOOTHBY.
THEODORE INGALLS.

TERRITORY OF OREGON,
County of Polk, ss:

On the second day of March, A. D. 1859, before the undersigned, a justice of the peace, came the above-named B'thuel Dove and Rachal Dove, his wife, who are known by me to be the identical persons described in and who executed the foregoing conveyance, and acknowledged that they had executed the same; and the said Rachal Dove, on an examination separate and apart from her husband, acknowledged that she executed the same freely, and without fear or compulsion from any one.

REASON R. BOOTHBY, *J. P.*

Exhibit No. 1.

363 *Original receipt, of which Exhibit F is a copy, admitted on the trial.*

Received of B. Dove two hundred dollars, to be applied on purchase of land purchased by me at sheriff's sale. The land known as Mrs. Dove' half of donation land claim.

July 26th, 1864.

B. HAYDEN.

364 Received of B. Dove two hundred dollars, to be applied on purchase of land purchased by me at sheriff's sale. The land known as Mrs. Dove' half of donation land-claim.

July 26, 1864.

B. HAYDEN.

(Endorsed:) Exhibit No. 1, admitted on trial by consent. R. H. Lamson, clerk.

365 In witness whereof the said sheriff, the party of the first part to these presents, hath hereunto set his hand and seal this 26th day of April, A. D. 1864.

I. M. BUTLER,
Sheriff Polk County.

Signed and sealed in the presence of—
CHAS. E. MOOR.
RUFUS MALLORY.

STATE OF OREGON,
County of Polk, ss:

On this the 26th day of April, A. D. 1864, before the undersigned, a county judge, came the above-named I. M. Butler, sheriff of the county of Polk, who is personally known to me to be the identical person described in and who executed the foregoing conveyance, and acknowledged that he executed the same for the purposes and considerations therein expressed.

CHAS. E. MOOR,
County Judge.

[Internal-revenue stamps, $2.00.]

(Exhibit No. 2.)

366 Exhibit No. 2.—Sheriff's deed to Ben. Hayden.

STATE OF OREGON,
County of Polk, ss:

I certify the within deed duly recorded in the Polk County record book, vol. 4 of deeds, on pages 372, 374, & 375, this 27th day of May, A. D. 1864.

W. C. WHITSON,
Recorder.

367 *Summons.*

In the circuit court of the State of Oregon for the county of Polk, ss.

RACHAEL DOVE, PLAINTIFF,
vs.
BENJAMIN HAYDEN, DEFENDANT.
} Suit in equity.

To the defendant:

In the name of the State of Oregon you are hereby required to appear and answer the complaint filed against you in the above-entitled action within ten days from date of services of this summons upon you, if served within this county, or if served within any other county of this State, then within twenty days from the date of the service of *of* this summons upon you; and if you fail so to answer, for want thereof the plaintiff apply to the court for the relief in the complaint, demand of which you are fully informed in complaint herewith served, and costs and disbursements. I hereby certify the above a true copy of the original summons in the above-entitled cause.

J. J. WILLIAMS, *Sheriff.*
E. W. LAWSON & THAYER & WILLIAMS,
Att'ys for Plaintiff.

368 (Endorsed:) Received Sept. 28, 1874, 10 o'clock p. m.
J. J. WILLIAMS,
Sheriff of Polk County.
G. W. LAWSON & THAYER & WILLIAMS,
Att'ys for Pl'ff.

369 (3.)

In the circuit court of the State of Oregon for the county of Polk.

RACHEL DOVE, PLAINTIFF,
vs. } Suit in equity.
BEN. HAYDEN, DEFENDANT.

The plaintiff, for cause of suit herein against the above-named defendant, alleges that she is a married woman; that she is the wife of Bethuel Dove; that she has been such married woman during all the times hereinafter mentioned.

That on or about the 1st day of December, 1848, her said husband settled on land claim No. 54, being *being* parts of section' 34 & 35, in T. 7 S., R. 4 W., and claim No. 59, being parts of sections 23 & in T. 8 S., R. 4 W., bounded and described as follows: Beginning at a point 19.50 chains E. of the SW. corner of said section 34, and running thence north 14.52 chains; thence south 81° E. 12.30 chains; thence N. 15.60 chains; thence E. 102.25 chains; thence S. 57.33 chains; thence W. 114.07 chains; and thence N. 29.50 chains, to the place of beginning, containing $638\frac{23}{100}$ acres of land, situated in the county Polk and State of Oregon.

370 That said settlement was made in accordance with the provisions of the act of Congress passed Sept. 27, 1870, known as the donation law, and that by virtue of said settlement, residence upon, and cultivation of said claims, and a full compliance with said law, she and her husband became the absolute owners thereof, and that a proper certificate upon due proof has been issued by the land-office to the said Bethuel Dove and this plaintiff for the same, bearing date Sept. 15, 1874, the south half of said donation claims having been set off and designated by the proper land-office as inuring to plaintiff, to be held by her in her own right; that after the completion of the said residence, and the compliance with the provisions of the said donation law, to wit, on the second day of March, 1859, this plaintiff executed, in connection with her said husband, a mortgage upon her portion of said donation claims; that said mortgage, so executed, was given to secure the payment of a sum of money amounting to about $1,500 with which to pay off an indebtedness her said husband was under to one William Griswold.

371 And this plaintiff alleges that she was induced to so execute the said mortgage by the solicitations of the def't, who was then, and still is, an att'y at law, and was at that time the att'y of her said husband in certain litigation between him and the said Wm. Griswold.

That said def't positively assured plaintiff, prior to her execution of said mortgage, that there was no danger of her losing her property by so doing, and promised her that if she would execute said mortgage, he, def't, would mortgage his own home-farm before she should lose her said land, and that through the def't's said representations, solicitations, and promises she consented to, & did, execute the said mortgage; that after the execution of said mortgage, and after the maturity of the debt which said mortgage was given to secure, and on or about the 23d day of Oct., 1863, a suit was commenced in the circuit court of the State of Oregon for the county of Polk, in favor of J. Emmons,
372 treasurer of Polk County, Oregon, as pl'ff, and against this pl'ff
and her husband, to foreclose the said mortgage and to sell the said land of pl'ff's to satisfy said indebtedness; that thereupon plaintiff retained & employed the said def't as her att'y and counsellor therein, and that under the advice of the def't, as such att'y & counsellor at law, a defense was made to said suit, which was conducted by the def't; and this pl'ff further alleges that such proceedings were had in said suit that said pl'ff therein recovered a decree therein, adjudging that her said land be sold to satisfy the said decree, amounting to the sum of $2,050.75; that thereupon a writ of execution upon the said decree was issued to the sheriff of the county of Polk aforesaid, commanding him to satisfy the said decree, with costs; that said sheriff, in pursuance of the command of said writ, advertised plaintiff's said land for sale; that prior to time of sale the defendant came to plaintiff's house to see plaintiff about the said sale; that pl'ff was not at home, & thereupon defendant left word with pl'ff's son, E. P. Dove,
373 to tell pl'ff from him not to be uneasy about the sale of the land;
that he, def't, had left a man to bid it off for her; which word the pl'ff then and before the sale received, and still confiding in def't as her att'y trusted the matter to him, and did not attend the sale; that pl'ff's said land was then and there at the day of sale deceitfully bid off by def't in his own name, and not in pl'ff's name, as def't had caused pl'ff to believe it would be; that def't bid off said land for about on' thousand two hundred & twenty-five dollars, in legal tenders, which were worth at that time but fifty c'ts in coin to the dollar, making said bid of the gold coin value of $6 , the sum actually paid by def't; that def't did not inform pl'ff that he had not bid off said land for her, and in about months afterwards, to wit, in July, 1864, def't came to pl'ff's house & solicited & obtained of plaintiff the sum of $200 in gold coin to pay, as he informed pl'ff through her hus-
374 band, on the redemption of the place from the def't, the def't
still representing and causing the pl'ff to believe the place was hers; that though only about $412.25 in gold coin, or $925 legal tenders, remained back upon said place, and pl'ff thereupon, and in order to raise said sum of money and entirely redeem her place from said debt, contracted with one O. H. Smith a lease of the same for cash rent in advance; the said Smith to loan her enough money to pay off the balance of debt against the place, and he to keep the place long enough to repay himself in the rents and profits; that thereupon the said Smith went into possession of the place, but did not pay the money as agreed, whether by connivance with the def't or not pl'ff does not know; that shortly after Smith took possession he relet the premises to one Moses Clark, who soon after surrendered the possession of the same to the def't and paid all the rent to him, and the def't has ever since retained the possession of the same, and has ever since received
375 the rents and profits of the said place; that pl'ff thereupon, hav-

ing lost her land & the rents, had no other means to make up the money for the rest of said bid, and has not at any time since had money, or been able to tender def't the balance of said bid, to wit, the sum of $412.25 in gold coin, or $925 in legal tenders, although pl'ff has been willing at all times since to account with def't, and allow him said sum and interest out of the rents and profits of said place, which pl'ff alleges are worth $400 per year in gold coin; that said def't has had said place for ten years, and the rents & profits are reasonably worth for that time the sum of $4,000 in gold coin, of which sum $3,000 is now reasonably due pl'ff after deducting def't's demand and reasonable compensations for his services as att'y, if he shall be entitled to any under the circumstances.

Pl'ff fu'ther alleges that she has often demanded of def't that he
376 should return to her the title and possession of her said lands, and
that he should account with her for the rents & profits thereof, which def't has failed & refused to do, and claims the said land as his own, and procured a sheriff's deed for the same, upon said sale so made by the sheriff aforesaid.

Pl'ff alleges that she was entirely ignorant of matters of law, and de*f*ended entirely for the management of her rights and interests regarding said foreclosure suit and for the securing of her interest in said property upon the def't, as her lawyer and att'y; that if the def't had informed her of the true conditions of the property and the state of the case that pl'ff could have easily procured the money by mortgage or otherwise of the premises to save the same, and to pay off all indebtedness thereon. Pl'ff further alleges and shows that at the time of said sale the premises were of much greater value than the sum bid by the def't; that the same was all under fence and was a very val-
uable prairie farm, there being only about 80 acres of brush land
377 on it, and at that time about 240 acres of it were under plough
& in good cultivation; that said farm at that time was worth at least four thousand dollars in gold coin, and that said farm is now worth at least twenty-five dollars per acre in gold coin.

Pl'ff further alleges that she has constantly endeavored to procure her rights in the premises. That for some reason or other she could not get att'ys to take her case & move in it. They seemed unwilling to commence suit for her against the def't, apparently because he was a lawyer, or because he was a powerful*l* politician, or for some other reason to pl'ff unknown; but pl'ff alleges that she has not slept wittingly upon her rights, and that this is the first time she could get her case into court, and that she has no adequate relief except in a court of equity. Pl'ff alleges that def't has violated the trust and confidence
reposed in him by pl'ff and has taken advantage of his employ-
378 ment in pl'ff's business to possess himself wrongfully of her
property & interests commit'ed to his care, and that he has obtained the same at a grossly inad*i*quate price, he being all the time an att'y at law and pl'ff's att'y in the premises.

Wherefore pl'ff prays a decree of this honourable court adjudging that the def't holds pl'ff's said real property in trust for her, and that he has received the rents & profits, and the use of the same for the time shown as & in trust for her, and that he be decreed to account with pl'ff, and after deducting all just demands of def't that he account for and pay over the balance found justly due pl'ff for the rents, profits, & use of her said farm for the time aforesaid, which sum pl'ff alleges amounts to $3,000 to her; and that also that def't be decreed to execute to pl'ff a good and sufficient deed of conveyance for the said real property aforesaid, so originally being granted to her in her own separate right by the Government of the United States, and that if he fail so to convey within thirty days after such decree then that such 379 decree shall be decreed and taken as conveying the same as by law provided, and for such other & further relief as a court of equity may lawfully and reasonably grant in the premises and upon the facts above stated, & for costs & disbursements.

G. W. LAWSON & THAYER & WILLIAMS,
Att'ys for Pl'ff.

STATE OF OREGON,
County of Polk:

I, Rachel Dove, on oath, say that I am the pl'ff in the above-entitled suit in equity, and that the foregoing complaint is true, as I verily believe.

her
RACHEL + DOVE.
mark.

Subscribed and sworn to before me, this 28' day of Sept., 1874.

W. H. RAY,
Justice of the Peace.

I certify the foregoing to be a true copy of the original complaint on file in this cause.

Sept. 28, 1874.

G. W. LAWSON,
Att'y for Pl'ff.

Copy of complaint, Exhibit No. 3.

380 (4.)

In the circuit court of the State of Oregon for the county of Polk, Nov. term, A. D. 1863.

J. EMMONS, TREAS. OF POLK COUNTY,
vs.
BETHUEL DOVE & RACHEL DOVE.
} In chancery to foreclose a mortgage.

The complaint of the pl'ff respectfully shows unto the hon. court that in the month of March, 1859, one William P. Lewis was the duly *qrat*ified and acting treasurer of the county of Polk, in the State of Oregon, and that as such treasurer he had charge of the school fund *to* said county, and that on the said 2d day of March, A. D. 1859, he loaned out of the said school fund to Bethuel Dove the sum of one thousand five hundred and fifty dollars ($1,550), with interest at the rate of twelve per cent. per annum, payable semi-annually in advance, and for the payment of which sum and interest the said Bethuel Dove made, executed, and delivered to the said Wm. P. Lewis, as treasurer of said county, his certain promiss*ary* note, in the words and figures following, to wit:

$1,550. Three years after date, for value received, I promise to 381 pay to Wm. P. Lewis, treasurer of Polk County, for the benefit of common schools, the sum of fifteen hundred and fifty dollars, with interest at the rate of twelve per cent. per annum, payable semi-annually in advance.

Dallas, Polk County, O. T., March 2d, 1859.

his
BETHUEL + DOVE.
mark.

Attest:
L. Mast &
J. S. Holman.

And then and delivered the said note to the said Lewis as treasurer as aforesaid; and on the same day, in order to more effectually secure the payment of the said sum of money and interest according to the terms of the said note, the said Bethuel Dove & Rachel Dove, his wife, created and delivered to the said Wm. B. Lewis, treasurer of Polk County, a mortgage upon the following-described property, to wit: The south half of Bethuel Dove's land claim No. 59, in T. 8 S., R. 4 west of the Wallamet meridian, not. Not. 1441, in Polk County, Oregon Terri-
tory, conditioned that if the said Bethuel Dove shall pay the said
382 sum of $1,550 principal, and the interest accruing thereon, ac-
cording to the terms of the promissary note aforesaid, then the said mortgage to be void; but if default be made in the payment of said sum and interest, then the said Wm. P. Lewis, as treasurer of said county, is authorized to sell the said premises according to law, and out of the proceeds of said sale to pay the said principal and interest. Pl'ff says that in the month of June, A. D. 1862, he was duly elected treasurer of said county of Polk, and took the necessary oath and filed his bonds, as by law required, and that said note and mortgage came to his hands as treasurer of said county of Polk, and that he is now the lawful holder of the same. That he is now the duly *grat*ified and acting treasurer of said county; that the said note and interest has not been paid according to its terms, nor any part thereof, except as hereinafter stated. The following sums are endorsed on said note:
March 2, 1859, $93; Sept. 8, 1859, $35; Oct. 3, 1860, $93; Feb.
383 2, 1861, $84; Feb. 8, 1861, $44. That there will be due on said note
principal and interest, on the 17' day of Nov., A. D. 1863, the sum of two thousand and fifty-two dollars and $\frac{75}{100}$. Pl'ff says that no action has been commenced at law for the recovery of the said sum, or any part thereof; wherefore pl'ff prays that a decree be made by the court directing that the said property be sold, and so much of the proceeds of the sale of the same as may be necessary to pay the amount of said note and interest, together with the costs and disbursements of this suit, be paid to the said pl'ff for the use of common-school fund of the said county of Polk, and that the pl'ff have judgement for the same, and the overplus, if any there be, paid into court for the ben*ife*t of said def'ts.

RUFFUS MALLORY,
Pros. Att'y.

384 State of Oregon,
County of Polk, ss:

I, J. Emmons, being first duly sworn, depose*s* and say*s* that he is the pl'ff in the above-entitled cause, and that he believes the matter stated in the foregoing complaint is true.

J. EMMONS.

Subscribed and sworn to before me this 23' day of Oct., A. D. 1863.
W. C. WHISTON, *Clerk.*

In the circuit court of the State of Oregon for the count' of Polk, Nov. term, A. D. 1863.

J. EMMONS, TREASURER OF POLK COUNTY, pl'ff,
vs.
BETHUEL DOVE & RACHAEL DOVE, DEF'TS.
} In chancery to foreclose a mortgage.

To Bethuel Dove & Rachel Dove, def'ts:

You are hereby summoned to appear in the circuit court of the State of Oregon for the county of Polk on the first day of the next term thereof, to be held at the court-house in Dallas, in said county, on the 3d Monday, the 16th day of November next, and answer the complaint of the pl'ff in this cause filed against you, asking judgment for the
385 sum of $2,052.75, and costs and disbursements of suit or judgements, for want thereof, will be entered against you.

R. MALLORY, *Pros. Att'y.*

STATE OF OREGON,
County of Polk, ss:

I hereby certify that I served the within summons and complaint on Bethuel Dove by delivering a duly-certified copy of said summons and complaint to Rachel Dove, a member of his family, a white person above the age of fourteen years, at his residence in Polk County, Or., on the 24th day of Oct., A. D. 1863, and to Rachel Dove by delivering to her a duly-certified copy of said summons and complaint at her residence in Polk County, Or., on the 24th day of Oct., A. D. 1863.

I. M. BUTLER,
Sheriff Polk County.

Fees: Serving summons, 50; serving complaint, 50; mileage 1.60; return, .50—2.00.

386 In the circuit court of the State of Oregon for the county of Polk Nov. term, 1863.

J. EMMONS, TREASURER OF POLK COUNTY, PL'FF
vs.
BETHUEL & RACHEL DOVE, DEF'TS
} I' chancery to foreclose a mortgage.

Now comes the above-named def't, by B. Hayden, his att'y, and demurs to complaint of pl'ff in the above-entitled action; for the reason that the county treasurer has no legal right to sue as such to collect monies due the school fund; wherefor' def't prays the said complaint be dismissed by the court at the costs of complainant.

{ SEAL OF THE CIRCUIT COURT
POLK COUNTY, OREGON. }

B. HAYDEN,
Att'y for Def't.

387 STATE OF OREGON,
County of Polk, ss:

I, W. S. Frink, clerk of said county, hereby certify that I have made and carefully compared the foregoing transcript, and that the same is a true copy and the whole thereof of the original, as the same appears on file in my office and in my custody and keeping.

REC. 308—9

Witness my hand and the seal of the circuit court of said county this 2' day of May, A. D. 1878.

{ SEAL OF THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR POLK COUNTY. }

W. S. FRINK, *Clerk*,
By H. HOLMAN,
Deputy Clerk.

Copy of demur'er. Exhibit No. 4, filed May 11, 1878. W. B. Gilbert, examiner. Filed Nov. 16, 1863. W. C. Whiston, clerk.

388 (5.)

Circuit court Nov. term, A. D. 1863.

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Polk, began and holden at the court-house in said county, on Monday the 16' day of Nov., A. D. 1863, and from day to day thereafter during the continuance of said term, the following proceedings were entered of record to wit:

Present, Hon. R. P. Boise, judge; Rufus Mallory, pros. att'y; W. C. Whiston, clerk; I. M. Butler, sheriff.

J. EMMONS, TREAS. OF POLK COUNTY, OR.,
vs.
BETHUEL DOVE & RACHEL DOVE. } Wednesday, Nov. 18, 1863.

Now, at this day comes the above-named pl'ff, by Mallory, his solicitor, and the said def'ts, by Hayden, their solicitor, and this cause came on to be heard on the complaint and the demur'er of the def'ts, and after hearing the allegations and arguments of counsel it is considered by
the court that said demur'er be overruled, and the said def'ts fail-
389 ing to answer said complaint, it is considered by the court that
said complaint be taken for confessed. And it appearing to the court that there is due on the promissory note upon which this suit is brought the sum of $2,052.75, it is therefore ordered and adjudged by the court that the pl'ff have and recover of the said def'ts the said sum of two thousand fifty two & $\frac{75}{100}$ dollars, the same being the amount named in the summons filed in this cause, and for his costs and disbursements in this behalf expended, and that he have execution therefore; and it fu'ther appearing to the court that at the time of the execution of the note described in said complaint the said def'ts, in order to secure the payment of said note, executed and delivered to the said pl'ff a mortgage upon the following-described real estate, to wit: the south half of Bethuel Dove's donation land claim No. 59, in T. 8 S., of R. 4 W. of Wallamet meridian, notification No. 1441, in Polk County, Oregon Territory, it is therefore ordered, adjudged, and decreed by the court that the said premises be sold as upon execution or law, and that the
proceeds of said sale be applied to the payment of the said judge-
390 ment, and that the overplus, if any there be, be paid to the said
def'ts, and that the said def'ts be forever foreclosed of their rights to said premises, and that the report of the sale of said premises be returned into this court at the next term thereof.

R. P. BOISE, *Judge.*

"Execution issued Jan. 8, 1864, and $1,177.50 collected on the same. Mar. 9, '64."

In the circuit court of the State of Oregon for the county of Polk.

J. EMMONS, TREASURER POLK CO., OR., PL'FF,
vs.
RACHAEL DOVE, DEF'T.

STATE OF OREGON,
County of Polk, ss:

I, the undersigned county clerk of the county of Polk, State of Oregon, and ex-officio clerk of the circuit court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in first circuit court r'cords of said court, at page
and the whole thereof, as said entry of judgment now appears of re-
cord in my custody; and I further certify that the foregoing
391 papers hereto annexed constitute the judgment-roll in said
suit.

Witness my hand and the seal of said court this 23' day of April, A. D. 1878.

W. S. FRINK, *Clerk*,
By H. HOLMAN, *Dep. Clerk.*

Exhibit No. 5. W. B. Gilbert.

(6.)

Circuit court, April term, A. D. 1864.

Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Polk, began and holden at the courthouse in Dallas, in said county, on Monday, the 25th day of April, A. D. 1864, and from day to day thereafter during the continuance of said term.

Present, Hon. R. P. Boise, judge; W. C. Whitson, clerk; J. M. Butler, sheriff; R. Mallory, pros. att'y.

When the following proceedings were had and entered of record, to wit:

392 J. EMMONS, TREAS. POLK COUNTY, OREGON,
vs.
BETHUEL DOVE & RACHEL DOVE.
Tuesday, April 26, 1864.

Now, at this day comes the said pl'ff, by Mallory, his att'y, & moves the confirma*n*tion of the sale of real estate heretofore made and returned unto this court to Ben. Hayden, and there being no objection filed thereto it is ordered that said sale be confirmed.

R. P. BOISE, *Judge.*

STATE OF OREGON,
County of Polk, ss:

I, W. S. Frink, clerk of said court, hereby certify that the foregoing is a true copy, and the whole thereof, of a motion for and order of confirmation of sale in the case of J. Emmons, treas. of Polk County, Oregon, vs. Bethuel Dove and Rachael Dove, as the same appears of record in my office.

Witness my hand and the seal of said Polk Co. this April 23, A. D. 1878.

[SEAL.]

W. S. FRINK, *Clerk.*
Per H. HOLMAN,
Deputy Clerk.

Exhibit No. 6. W. B. Gilbert, examiner.

393 (7.)

This indenture, made this 20' day of April, A. D. 1864, between I. M. Butler, sheriff of the county of Polk and the State of Oregon, of the first part, and Ben. Hayden, of the county & State aforesaid, of the second part.

Whereas by virtue of an execution issued out and under the seal of the circuit court of the third judicial district of the State of Oregon for the county of Polk, tested the 8' day of January, A. D. 1864, said execution was issued upon a judgement by a decree of foreclosure of a mortgage in said court, on the 18th day of November, A. D. 1863, in favor of J. Emmons, treasurer of Polk County, and against Betheuel Dove and Rachel Dove, to the said sheriff directed and delivered, commanding that out of the personal property of the said judgement debtor, in his county, he should cause to be made certain moneys in the said execution specified, and if sufficient personal property could not be found that then he should cause the a*n*mount of said judgement to be made out of the real property of said defendants, or the premises mortgaged by said defendants, which were
394 foreclosed on the day and date above written; and whereas sufficient personal property of said judgement debtors could not be found wherefore he, the said sheriff, could cause to be made the mon*n*ies specified in said execution, he, the said sheriff, did, in obedience to said command, levy on, take, and s*ie*ze all the estate, *w*right, title, and interest which the said judgment debtor so had of, in, and to the lands, tenements, real estate, and premises hereafter particular'y set forth and described, with the appurtenances, and did, on the 20th day of Feb'uary, A. D. 1864, proceed to the place of sale, but for the lack of bidders and other sufficient causes, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of said day, pos'poned the said sale, by public proclamation, for one week, to wit, on the 27th day of said month, and for the same cause I did, on said day, between the hours of 9 o'clock a. m. and 4 o'clock p. m., by public proclamation, adjourn the said sale for *an* week, to wit, on the 5th day of Mar*t*ch, A. D. 1864, at which time I did sell the
395 said premises at public*k* auction, as is required by law, to Benjamin F. Hayden for the sum*e* of twelve hundred and twenty-five dollars, he being the highest bidder and said sum*e* being the highest sum*e* bidden, and the whole price being paid for the same; and whence the said sheriff, after receiving from said purchaser the said sum of money so holden as aforesaid, gave to him such certificate as is by law required to given, and filed in the office of the county clerk of Polk County a d'plicate of such certificate; and whereas sixty days having expired from the date order confirming the sale and no redemption having been made: Now, this indenture witnesseth that I, I. M. Butler, the sheriff afor'said, and party hereto of the first part, by virtue *by virtue* of the said execution and pursu'nce of the statutes in such causes made and provided, for and in con*ce*deration of the sum*e* of money above mentioned, to him in hand paid as aforesaid by the said party of the sec*k*ond part, the receipt whereof is hereby acknowledged,

hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, and confirm, with the said Benjamin F. Hayden, his heirs and assigns, all the estate, right, title, 396 and interest of the said Bethuel and Rachel Dove which they, on the said 18th day of Nov., A. D. 1863, or at any time afterwards, of, in, and to all the following-described premises, to wit: The south half of Bethuel Dove land claim No. 29, not. 1441, in township 8 south, of range 4 west of the Willamett meridian, together with all the hereditaments and appurt*u*nance' thereunto belonging or in otherwise appertaining; to have and to hold the above-mentioned pre*i*m*s*i*ses, with the appurtenance', unto the said Benjamin F. Hayden, his heirs and assigns, forever, as fully absolu*l*ely as he, the said sheriff aforesaid, can, may, or ought to, by virtu*t*e of the aforesaid execution and of the statutes in such cases made and provided, grant, bargain, sell, convey, release, and confirm the same.

In witness whereof the said sheriff, the said party of the first part to these presents, hath hereunto set his hand and seal this 26th day of April, A. D. 1864.

I. M. BUTLER, [SEAL.]
Sheriff Polk County.

Signed and sealed in the presence of—
CHAS. E. MOOR.
RUFUS MALLORY.

[U. S. revenue stamp, $2.00.]

397 STATE OF OREGON,
County of Polk, ss:

On this the 26' day of April, A. D. 1864, before the undersigned, a county judge, came the above-named I. M. Butler, sheriff of the county of Polk, who is personally known to me to be the identical person described in and who executed the foregoing conveyance, and acknowledged that he executed the same for the purposes and considerations therein expressed.

CHAS. E. MOOR,
County Judge.

Recorded May 27th, 1'64, vol. 4, pages 373, 374, 375.
W. C. WHITSON, *Recorder.*

STATE OF OREGON,
County of Polk, ss:

I, W. S. Frink, clerk in and for said county, hereby certify that I have made and compared the foregoing copy of deed with the original deed on record in my office, and that the same is a true copy & the whole thereof, and that it is recorded in Polk County records, book 4 of deeds, on pages 373, 374, & 375, and that the same is recorded therein on the 27' day of May, A. D, 1864, by W. C. Whitson, recorder.

In testimony whereof I have hereunto set my hand & seal of said Polk Co. this 23' day of April, A. D. 1878.

[SEAL.] W. S. FRINK, *Clerk,*
By H. HOLMAN, *Deputy.*

Exhibit No. 7. W. B. Gilbert, examiner.

398 (Endorsed:) Filed October 26th, 1878. R. H. Lamson, clerk.

399 THE UNITED STATES OF AMERICA,
District of Oregon, ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a true copy of the record and all proceedings, including the opinions of the court, in the cause in equity entitled Charles Manning, complainant, vs. Benjamin Hayden, defendant, and of the whole thereof; and I further certify that the citation hereto attached is the original citation issued in said cause.

Witness my hand and the seal of said court this August 28, 1879.

[SEAL.] R. H. LAMSON, *Clerk.*

(Indorsement on cover:) No. 308. Benjamin Hayden, appellant, vs Charles Manning. Oregon C. C. U. S. Filed 10th October, 1879.